

**IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA 'A' BENCH, KOLKATA**

(Before Sri J. Sudhakar Reddy, Accountant Member & Sri Aby T. Varkey, Judicial Member)

ITA No. 840/Kol/2019
Assessment Year: 2014-15

Skan Enterprise.....Appellant

C/o. Subash Agarwal & Associates, Advocates

Siddha Gibson

1, Gibson Lane

Suite 213

2nd Floor

Kolkata - 700 069

[PAN : AAMFS 2138 P]

Vs.

Pr. Commissioner of Income Tax-12, Kolkata.....Respondent

Appearances by:

Shri Subash Agarwal, Advocate, appeared on behalf of the assessee.

Shri Ram Bilash Meena, CIT, D/R, appearing on behalf of the Revenue.

Date of concluding the hearing : March 3rd, 2020

Date of pronouncing the order : March 18th, 2020

ORDER

Per J. Sudhakar Reddy, AM :-

This appeal filed by the assessee is directed against the order of the Learned Pr. Commissioner of Income Tax - 12, Kolkata, (hereinafter the "Id.CIT(A)"), passed u/s. 263 of the Income Tax Act, 1961 (the 'Act'), dt. 15/03/2019, for the Assessment Year 2014-15.

2. The assessee is engaged in the business of wholesale trade in electrical goods. It is a partnership firm. The assessee firm also has income from commission and interest. It filed its return of income on 21/11/2014 for the impugned Assessment Year, declaring total income of Rs.7,34,850/-. The Assessing Officer passed an order u/s 143(3) of the Act on 27/12/2016 determining the total income at Rs.48,01,970/- *interalia* making addition of Rs.29,58,196/- on account of disallowance of expenditure claimed on payment of commission, on ad-hoc basis at the rate of 20% of the total commission payments and Rs.10,45,060/- being 20% of the administrative expenses claimed by the assessee on ad-hoc basis on the ground that supporting details and vouchers were not produced.

The Id. Pr. CIT, Kolkata, issued a notice u/s 263 of the Act, dt. 24/09/2018 proposing to revise the order passed by Assessing Officer u/s 143(3) of the Act, on 15/03/2019. The relevant part of the notice is extracted below for ready reference:-

“On perusal of the assessment records, it was seen that the assessee failed to substantiate the necessity of payment of large amount of commission in a business of sale of Electric Goods, as well as failed to produce evidence of rendering service.

It also transpired from record that details of the parties to whom commission were paid were not produced by the assessee. Because of irregular appearance by the assessee/AR, 20% of the total commission of Rs.1,47,90,981/- was disallowed, without any proper verification.

Apart from this, other CASS reasons were not found to be verified properly while passing the order u/s. 143(3).

Absence of the proper examination/verification regarding the above has rendered the assessment erroneous and prejudicial to the interest of the revenue which deserves to be revised u/s. 263 of the I.T. Act, 1961.”

2.1. The assessee replied as follows:-

“The assessee filed its return for A.Y. 2014-15 within due time. The case was assessed u/s 143(3) under CASS.

In the show cause notice issue on the above mentioned issue of revision of the order of the Ld. Income Tax Officer, it has been alleged that the revision is warranted mainly because of the following:-

1. *That the assessee has filed to substantiate the necessity for paying large amount of commission in business of sale of electric goods as well as failed to produce evidence of rendering of service.*
2. *Parties to whom commission was paid were not produced.*
3. *Irregular appearance of A/R*
4. *A 20% of total commission of Rs.14790981/- was disallowed without proper verification*
5. *Other CASS were not found to be verified properly, while passing the order.*

As regards ‘Necessity’ to pay commission, we humbly submit that the assessee is doing business in consumer durable Goods segment, which is very competitive and therefore every year it has to pay commission. It is not that this year alone, it has paid commission. Chart showing sales vis a vis commission paid is appended below

Fin Year	Sales	Commission
	Rs. In crores	Rs in lacs
09-10	11.49	26.25
10-11	19.66	21.65
11-12	28.35	26.05
12-13	43.00	84.96
13-14	37.75	147.9
14-15	42.01	81.12
15-16	39.02	41.53
16-17	46.54	94.44

Your honour will appreciate that the Assessing Officer has clearly mentioned in the order that the assessee had submitted the copies of commission bills and I T records of

the payees and a copy of the same in form of a bound book is once again been submitted to you herewith. The Assessing Officer on perusal of these documents and may be on perusal of earlier assessment records as well did not ask for production of any of the payees has also completed all compliances.

Your honour will further appreciate that the assessee is no position to guide the Ld A O in respect of any matter mentioned here in above. The assessee can just provide the details as called for and the nature and type of enquiry to be made is totally decided by the A O. Nor was the assessee made known of the points, which needed to be looked into or CASS points involved.

It is further submitted that in the instant case, as accepted and admitted in the order, the A.O. after making proper inquiries in respect of commission, all expenses, all books of account, purchase and sale records and bank book and bank statement completed the assessment proceedings by treating the same as genuine.

.....During the course of scrutiny the Ld. Income Tax Officer wanted details of commission paid to achieve the turnover. Proper details with PAN no. and address were provided to the Ld Income Tax Officer.

It is submitted that the AO examined all the relevant documents and had conducted a proper enquiry. Details of commission were made available to him and based on his experience in earlier years, he was reasonably satisfied about the appropriateness of the commission paid. Other matters were looked into adequately and appropriately.

It is also humbly submitted that since the A.O. had made proper enquiries in respect of the commission paid on other issues as well, the order of the A.O. is neither erroneous nor prejudicial to the interest of the revenue.”

2.2. Thereafter on 5th December, 2018, the assessee replied as follows:-

“Sub: Written Submission in reply to the show cause notice dated 13.09.2018 issued to our client- Skan Enterprises for AY 2014-15 further to the hearing on 29-11-2018

In accordance to the directions issued and the requisition made in the earlier hearing, we make the following submissions -

1. We are enclosing herewith the party wise chart showing commission paid, TDS deducted quarter wise, challans in respect of Tds deposited and also copies of TDS returns for all the four quarters. Kindly note that an amount of Rs 14790981/- has been subjected to the deduction of tax as against commission paid amounting to Rs 14790981/-, which means TDS was deducted on whole of the commission paid.

2. There are no written agreements with the agents.

3. The products dealt with by the assessee demand that the shop keepers in various areas keep its products in stock and in display and there is a large no of shops scattered all over west bengal , which it is uneconomical to serve keeping permanent employees. Therefore as a prudent market practice, all distributors and C & F agents resort to the network of agents. These agents are mostly people

having contacts with shops and they have a good face value when it comes to selling goods through that shop.

Under these circumstances, the assessee also engaged these agents.

4. There is nothing on record that whether the agent approached the assessee or the assessee approached him. It happens both ways but no records have been kept to show who was engaged in which way.

5. Rate of commission varied from case to case depending upon the various factors such as –

Quantum of off take/sale

Need to sell in that area

Payment terms

Market report/credential of that particular agent

Selling rate

Therefore there are no fix norms, nor is there any specific market rate but most of the distributors follow the same pattern and therefore in way. It can be said that the assessee has followed the market patterns.”

3. The Id. Pr. CIT was not satisfied with these replies. At para 5 of his order, he held as follows:-

“5. The above submissions of the assessee were given a thoughtful consideration by me. Before delving into the merits of the case, it would be appropriate to throw some light on the facts which confer jurisdiction on the Principal CIT to act under 263 of the Act.

Daring the hearing held by the undersigned with the Assessee's A/R, copy of Quarterly TDS Statement, challans for TDS on commission, the details of parties to whom commission was paid etc. were produced for verification which matches with the observation of the A.O. under para 4 of its order where he remarked.”

QUOTED:-

The submission of the assessee is considered but the contention of reply is not tenable as the assessee failed, to furnish full details in support of commission paid Of Rs.1,47,90,981/- . However, the A/R was asked why the commission will not be disallowed as per U/s. 37 of the I.T. Act. 1961. Though u/s. 37 deary defines In (Explanation-1) for the removal of doubt. It is hereby declared that any expenditure Incurred by an assessee for any purpose which is offence or which is prohibited by law shall not be deemed to law been incurred by purpose of business and no deduction or allowances shall be made in respect of such expenditure.

In the instant case, it is observed that the assessee paid Rs.1,47,90,981/- as commission is excessively higher in comparison to assessee's sales during the financial year 2013-14. However, evidences of such payments could not be verified fully due to inaccurate particulars. Hence, 20% of commission paid i.e., Rs.29,58,196/- is disallowed and added back to assessee's total income. Penalty proceedings u/s. 271(1)(c) of the Income Tax Act, 1961 is initiated separately for concealment of income by claiming of excess expenditure under this head. [Addition: Rs.29,58,196/-]

UNQUOTED:-

From a plain and simple reading of the relevant part of the assessment order as abstracted above it, It shall be clear that enquiries were not at all made by the A.O. In relation to the genuineness of the commissions paid allegedly. The assessment order as well as the assessment records bear testimony to this fact. Even the assessment records revealed that the Assessing Officer had only brought on record the documents of commission payments as available in its records/ books of accounts. No enquiries were made from the third parties i.e. commission agents to whom commissions were paid by the Assessing Officer. Chapter and verse there was complete lack of enquiry on this aspect of the matter rendering the decision taken by the Assessing Officer nugatory. Therefore, the circumstances justify setting aside of the order passed by the Assessing Officer under: section 143(3) on 27/12/2016. The A.O. is directed to verify the genuineness of the commissions paid by the assessee to the various commission agents by having recourse to various measures of enquiries prescribed under the Income Tax Act, 1961. The Assessing Officer shall pass a reasoned and speaking order after strictly adhering to the principles of natural justice. The case is disposed off in the above terms."

4. Aggrieved the assessee is in appeal before us.
5. The Id. Counsel for the assessee submitted that, in the original assessment proceedings, the Assessing Officer had raised queries on this issue of allowability of commission expenditure and the assessee has filed all necessary details in this regard. He filed a paper book running into 500 pages, which consisted of the copies of all the details filed by the assessee (pg. 22 to 50), in support of the genuineness of the claim of payment of commission, which was filed before the Assessing Officer. He submitted that the Id. Pr. CIT was wrong in concluding that the assessee has not filed all relevant details and documents before the Assessing Officer and the Assessing Officer has not examined the same. He submitted that this is factually incorrect and took this Bench through the various evidences filed by the assessee before the Assessing Officer in support of his claims of allowability account of commission payment, which included:-
 - a) Ledger accounts of the parties
 - b) Details of tax deducted at source from these parties on commission payments.
 - c) Annexures of bills raised by those parties giving the items of sale on which a claim of commission was made.
 - d) Copy of the account of the assessee firm, in the books of the commission agents.
 - e) Copy of form no. 16A etc.

5.1. He submitted that the commission was claimed by these agents on sale of each item of electric goods, the details of which were furnished. He submitted that the Assessing Officer has examined these documents and thereafter chose to disallow on adhoc basis @ 20% of the expenditure claimed as commission payments. He pointed out that the Id. Pr. CIT alleges that the Assessing Officer has not made proper enquiries and argued that the extent of enquiry to be made is to be determined by the Assessing Officer and cannot be a ground of revision by the Id. Pr. CIT. He further submitted that not making enquiries from third parties by the Assessing Officer, cannot also be a ground for revision u/s 263 of the Act and it cannot be classified as a case of lack of enquiry. He vehemently contended that the Id. Pr. CIT, is wrong in exercising his powers u/s 263 of the Act, for the sole purpose of directing the Assessing Officer that enquiries have to be made on this issue, only in a particular manner as the Id. Pr. CIT things fit. He argued that the Assessing Officer conducted detailed examination of the issue during the course of assessment proceedings and has come to a possible view and disallowed 20% of the expenditure claimed as excessive. He pointed out that similar payments were being made to the very same parties in the earlier Assessment Years as well as in the subsequent Assessment Years and that the Assessing Officer has accepted the same in those Assessment Years.

5.2. The Id. Counsel for the assessee submitted that the assessee had carried the matter of disallowance of 20% of the expenditure claimed on commission payments by the Assessing Officer in the assessment order, in appeal before the Id. CIT(A) and the same is pending disposal and under those circumstances, the Id. Pr. CIT cannot exercise his powers u/s 263 of the Act on the very same issue which is before the Id. CIT(A). He relied on the following case law in support of his contention that the reopening is bad in law:-

- *Smt. Renuka Philip vs. Income-tax Officer, Business Ward-XV(2)Chennai [2018] 409 ITR 567 (Madras)*
- *Commissioner of Income-tax (Central), Ludhiana vs. Max India Ltd. [2007] 295 ITR 282 (SC)*

5.3. On the issue of allowability of claim of expenditure on commission payments. He relied on the following judgments of the Hon'ble Jurisdictional High Court:-

- *Commissioner of Income-tax vs. M/s. Inbuilt Merchant Pvt. Ltd. in ITAT No. 225 of 2013, G.A. No. 3825 of 2013, judgment dt. 14/03/2014*
- *CIT vs. Alpha Hydraulics Pvt. Ltd. in ITA No. 549 of 2004, judgment dt. 10/11/2014*

5.4. He prayed for relief.

6. The ld. D/R, on the other hand, opposed the contentions of the assessee and submitted that the Assessing Officer has called for information and evidence but after the assessee submitted the same, the Assessing Officer has not examined these papers. He argued that the fundamental aspect, as to whether the services were rendered or not, was not examined by the Assessing Officer. He relied on the order passed u/s 263 of the Act and submitted that, no proper enquiries were made by the Assessing Officer. He relied on the order passed u/s 263 of the Act and submitted that, no proper enquiries were made by the Assessing Officer during the course of original assessment proceedings as the Assessing Officer had not examined the genuineness of the commission claimed as paid and has not made enquiries from third parties i.e., commission agents. Thus, he submits that this is a case of lack of enquiry which makes the assessment order not only erroneous but also prejudicial to the interest of the revenue. He prayed that the order passed u/s 263 of the Act, be upheld.

7. We have heard rival contentions. On careful consideration of the facts and circumstances of the case, perusal of the papers on record, orders of the authorities below as well as case law cited, we hold as follows:-

8. A perusal of the assessment order and the details filed by the assessee before the Assessing Officer, in reply to the queries raised by the Assessing Officer during the assessment proceedings demonstrate that this is not a case of lack of enquiry as stated by the ld. Pr. CIT in the last paragraph of his order. This statement is factually incorrect. The Assessing Officer has called for information on the claim of deduction of expenditure made by the assessee and in response thereto, the assessee has filed voluminous details. Payments were made on receipt of claim bills through banking channels. Tax was also deducted at source from these payments. The bills raised by the commission agents along with the list of electric items sold by them based on which the

commission was claimed was placed before the Assessing Officer as well as the Id. Pr. CIT. This is also a fact that the assessee has been paying and claiming as a deduction commission paid to agents, for all the previous Assessment Years as well as for the subsequent Assessment Years. It is common knowledge that in this segment of business, the competition is severe and requires special measures to boost sales. The payment of commission has been accepted as genuine by the revenue in the earlier years as well as in the subsequent Assessment Years.

8.1. The Hon'ble Calcutta High Court in the case of *Commissioner of Income-tax vs. M/s. Inbuilt Merchant Pvt. Ltd. (supra)* has held as follows:-

"The views expressed by the Assessing Officer are erroneous in law. The Assessing Officer has overlooked the importance of the books of accounts maintained in the ordinary course of business. Reference in this regard may be made to sub-section (2) of [Section 32](#) of the Indian Evidence Act, 1872. The books of accounts maintained in the ordinary course of business are relevant and they cannot be discarded in the absence of appropriate reasons. The mere fact that recipient did not reply in some cases or they were not found at the address furnished by the assessee does not in the least prove the fact that they were non existent or that the payments shown to have been made by the assessee were imaginary. With the advancement of technology, it has become possible to sell goods throughout the country through the internet. For that purpose, agents are required throughout the country. The mechanism in that regard has been disclosed by the assessee and has been recorded in the order of the CIT (Appeals). For the purpose of carrying on its business, the assessee has to recruit the agents. It may not be possible for the assessee to know them personally. Whatever address was furnished to the assessee, has been disclosed to the Income-tax Department. Payments were admittedly made by cheque after deduction of tax. The tax deducted as source has duly been deposited. The judgment in the case of [CIT vs. Precision Finance Pvt. Ltd.](#) reported in 208 ITR 465 relied upon by Mr. Bhowmick does not really assist him. The aforesaid judgment is an authority for the proposition that mere payment by account payee cheque cannot establish that the transaction was genuine, but in the case before us, besides the fact that payment was made by cheque, there are other pieces of evidence available which are as follows:

- a) *Books of Accounts maintained by the assessee in the ordinary course of business;*
- b) *Deduction of Tax at source;*
- c) *Deposit of the money deducted at source;*
- d) *Particulars of the recipient were duly furnished;*

We are, as such, of the opinion that the views expressed by the learned Tribunal are unexceptionable. We, therefore refuse to admit the appeal. The appeal is thus dismissed."

8.2. Similarly, the Hon'ble Jurisdictional High Court in the case of *CIT vs. Alpha Hydraulics Pvt. Ltd. (supra)*, held as follows:-

"We find that the Tribunal while allowing the appeal of the assessee and held as under :

"We have considered the rival submissions and gone through the facts of the case. We find that in the present case there is a binding contract between the parties by which the recipients of the commission had the right to enforce realisation of commission stipulated between the parties. We also find from the communication between the parties that the payment was duly received by the parties and paid by the assessee by account payee cheques. The revenue has not alleged that the parties to the transactions are related to each other or that the payments are not genuine or that the payments having been made by the assessee to the recipients have found their way back to the assessee some way or the other. Such being the case, we find that the authorities below were not justified in rejecting the claim of the assessee for payment of commission. Since all the ingredients necessary for genuine business transaction exist in this case, we do not find any merit in the addition made by the AO and in the action of the CIT(A) in confirming the same. In reversing their orders, and respectfully following the decision of the Hon'ble Calcutta High Court in the case of Masther & plant (India) Ltd. (Supra) and the case of the Tribunal, Mumbai Bench (Third Member) discussed herein above, we allow the appeal of the assessee."

Heard Mr. Das, learned advocate appearing for the appellant revenue and Mr. J. P. Khaitan, learned senior advocate appearing for the respondent assessee. Before us the revenue could not demonstrate either the money was not paid or the money was paid and routed back to the assessee. In the circumstances interference with the order of the Tribunal is not warranted. No question arise for adjudication. The application and the appeal are dismissed."

9. Applying the propositions of law laid down in the above case law to the facts of this case, we come to the conclusion that the Assessing Officer has taken a possible view that the expenditure in question claimed by the assessee as commission payment, is allowable in part. This cannot be a case of lack of enquiry or non-application of mind. The issue whether third party enquiries have to be made or not during the course of investigation, is the prerogative of the Assessing Officer, as he is the investigator. The type, nature and extent of investigation is the prerogative of the Assessing Officer. The ld. Pr. CIT, cannot, in our view, invoke his power u/s 263 of the Act for revising an order passed u/s 143(3) of the Act for the reason that in his view, the investigation/enquiry should be conducted in a particular manner or to a particular extent. Inadequate enquiry cannot be a ground of revision.

9.1. On facts, this is a case where an enquiry was conducted and a possible view taken based on the examination of the materials available on record. The Hon'ble Andhra Pradesh High Court in the case of *Spectra Shares and Scrips Pvt. Ltd. V CIT (AP) 354 ITR 35* had considered a number of judgments on this issue of exercise of jurisdiction u/s 263 of the Act by the Principal Commissioner of Income Tax and culled the principles laid down in the judgments as below :

*"24. In **Malabar Industrial Co.Ltd. (2 Supra)**, the Supreme Court held that a bare reading of Sec.263 makes it clear that the prerequisite for the exercise of jurisdiction by the Commissioner suomotu under it, is the order of the Income Tax Officer is erroneous in so far as it is prejudicial to the interests of the Revenue. 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. If one of them is absent – if the order of the Income Tax Officer is erroneous but is not prejudicial to the Revenue or if it is not erroneous but it is prejudicial to the Revenue – recourse cannot be had to Sec.263 (1) of the Act. It also held at pg-88 as follows:*

"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 the Assessing Officer cannot be treated as prejudicial to the interests of the Revenue. For example, when an Income-tax Officer adopted one of the courses permissible in law and it has resulted in loss of Revenue: or where two views are possible and the Income-tax Officer 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 Income-tax Officer 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. RampyarideviSaraogi v. CIT (1968) 67 ITR 84 (SC) and in Smt. Tara Devi Aggarwal V. CIT (1973) 88 ITR 323 (SC)".

*25. In **Max India Ltd. (3 Supra)**, reiterated the view in **Malabar Industrial Co.Ltd. (2 Supra)** and observed that every loss of Revenue as a consequence of an order of the Assessing Officer cannot be treated as prejudicial to the interests of the Revenue. For example, when an Income Tax Officer adopted one of the courses permissible in law and it has resulted in loss of revenue; or where two views are possible and the Income Tax Officer 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 Income Tax Officer is unsustainable in law. On the facts of that case, Sec.80HHC(3) as it then stood was interpreted by the Assessing Officer but the Revenue contended that in view of the 2005 Amendment which is clarificatory and retrospective in nature, the view of the Assessing Officer was unsustainable in law and the Commissioner was correct in invoking Sec.263. But the Supreme Court rejected the said contention and held that when the Commissioner passed his order disagreeing with the view of the Assessing Officer, there were two views on the word "profits" in that section; that the said section was amended eleven times; that different views existed on the day when the Commissioner passed his order; that the mechanics of the section had become so complicated over the years that two views were inherently possible; and therefore, the subsequent amendment in 2005 even though retrospective will not attract the provision of Sec.263.*

*26. In **Vikas Polymers (4 Supra)**, the Delhi High Court held that the power of suomotu revision exercisable by the Commissioner under the provisions of Sec.263 is supervisory in nature; that an "erroneous judgment" means one which is not in accordance with law; that 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 differently or more elaborately; that the section does not visualize the substitution of the judgment of the Commissioner for that of the Income Tax Officer, who passed the order unless the decision is not in accordance with the law; that to invoke *suomotu* revisional powers to reopen a concluded assessment under Sec.263, the Commissioner must give reasons; that a bare reiteration by him that the order of the Income Tax Officer is erroneous in so far as it is prejudicial to the interests of the Revenue, will not suffice; that the reasons must be such as to show that the enhancement or modification of the assessment or cancellation of the assessment or directions issued for a fresh assessment were called for, and must irresistibly lead to the conclusion that the order of the Income Tax Officer was not only erroneous but was prejudicial to the interests of the Revenue. Thus, while the Income Tax Officer is not called upon to write an elaborate judgment giving detailed reasons in respect of each and every disallowance, deduction, etc., it is incumbent upon the Commissioner not to exercise his *suomotu* revisional powers unless supported by adequate reasons for doing so; that if a query is raised during the course of the scrutiny by the Assessing Officer, which was answered to the satisfaction of the Assessing Officer, but neither the query nor the answer were reflected in the assessment order, this would not by itself lead to the conclusion that the order of the Assessing Officer called for interference and revision.

27. In **Sunbeam Auto Ltd.** (5 Supra), the Delhi High Court held that the Assessing Officer in the assessment order is not required to give a detailed reason in respect of each and every item of deduction, etc.; that whether there was application of mind before allowing the expenditure in question has to be seen; that if there was an inquiry, even inadequate that would not by itself give occasion to the Commissioner to pass orders under Sec.263 merely because he has a different opinion in the matter; that it is only in cases of lack of inquiry that such a course of action would be open; that an assessment order made by the Income Tax Officer cannot be branded as erroneous by the Commissioner simply because, according to him, the order should have been written more elaborately; there must be some *prima facie* material on record to show that the 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. In that case, the Delhi High Court held that the Commissioner in the exercise of revisional power could not have objected to the finding of the Assessing Officer that expenditure on tools and dies by the assessee, a manufacturer of Car parts, is revenue expenditure where the said claim was allowed by the latter on being satisfied with the explanation of the assessee and where the same accounting practice followed by the assessee for number of years with the approval of the Income Tax Authorities. It held that the Assessing Officer had called for explanation on the very item from the assessee and the assessee had furnished its explanation. Merely because the Assessing Officer in his order did not make an elaborate discussion in that regard, his order cannot be termed as erroneous. The opinion of the Assessing Officer is one of the possible views and there was no material before the Commissioner to vary that opinion and ask for fresh inquiry.

28. In **Gabriel India Ltd.** (6 Supra), the Bombay High Court held that a 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. It held that the Commissioner cannot initiate proceedings with a view to start fishing and roving inquiries in matters or orders which are already concluded; that the department cannot be permitted to begin fresh litigation because of new views they entertain on facts or new versions which they present as to what should be the inference or proper inference either of the facts disclosed or the weight of the circumstance; that if this is permitted, litigation would have no end except when legal ingenuity is exhausted; that to do so is to divide one argument into two and multiply the litigation. It held that cases may be visualized where the Income Tax Officer while making an assessment examines the accounts, makes inquiries, applies his mind to the facts and circumstances of the case and determines the income either by accepting the account or by making some estimate himself; that the Commissioner, on perusal of the record, may be 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; but that would not vest the Commissioner with power to reexamine the accounts and determine the income himself at a higher figure; there must be material available on the record called for by the Commissioner to satisfy him prima facie that the order is both erroneous and prejudicial to the interests of the Revenue. Otherwise, it would amount to giving unbridled and arbitrary power to the revising authority to initiate proceedings for revision in every case and start re-examination and fresh inquiry in matters which have already been concluded under law.

29. In **M.S. Raju**(15 Supra), this Court has held that the power of the Commissioner under Sec.263 (1) is not limited only to the material which was available before the Assessing Officer and, in order to protect the interests of the Revenue, the Commissioner is entitled to examine any other records which are available at the time of examination by him and to take into consideration even those events which arose subsequent to the order of assessment.

30. In **Rampyari Devi Saraogi**(21 Supra), the Commissioner in exercise of revisional powers cancelled assessee's assessment for the years 1952-1953 to 1960-61 because he found that the income tax officer was not justified in accepting the initial capital, the gift received and sale of jewellery, the income from business etc., without any enquiry or evidence whatsoever . He directed the income tax officer to do fresh assessment after making proper enquiry and investigation in regard to the jurisdiction. The assessee complained before the Supreme Court that no fair or reasonable opportunity was given to her. The Supreme Court held that there was ample material to show that the income tax officer made the assessments in undue hurry; that he had passed a short stereo typed assessment order for each assessment year; that on the face of the record, the orders were pre-judicial to the interest of the Revenue; and no prejudice was caused to the assessee on account of failure of the Commissioner to indicate the results of the enquiry made by him, as she would have a full opportunity for showing to the income tax officer whether he had jurisdiction or not and whether the income tax assessed in the assessment years which were originally passed were correct or not"

31. From the above decisions, the following principles as to exercise of jurisdiction by the Commissioner u/s.263 of the Act can be culled out:

a) *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. If erroneous but is not prejudicial to the Revenue or if it is not erroneous but it is prejudicial to the Revenue – recourse cannot be had to Sec.263 (1) of the Act.*

b) *Every loss of revenue as a consequence of an order of the Assessing Officer cannot be treated as prejudicial to the interests of the Revenue. For example, when an Income-tax Officer adopted one of the courses permissible in law and it has resulted in loss of Revenue: or where two views are possible and the Income-tax Officer 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 Income-tax Officer is unsustainable in law.*

c) *To invoke suomotu revisional powers to reopen a concluded assessment under Sec.263, the Commissioner must give reasons; that a bare reiteration by him that the order of the Income Tax Officer is erroneous in so far as it is prejudicial to the interests of the Revenue, will not suffice; that the reasons must be such as to show that the and must irresistibly lead to the conclusion that the order of the Income Tax Officer was not only erroneous but was prejudicial to the interests of the Revenue. Thus, while the Income Tax Officer is not called upon to write an elaborate judgment giving detailed reasons in respect of each and every disallowance, deduction, etc., it is incumbent upon the Commissioner not to exercise his suomotu revisional powers unless supported by adequate reasons for doing so; that if a query is raised during the course of the scrutiny by the Assessing Officer, which was answered to the satisfaction of the Assessing Officer, but neither the query nor the answer were reflected in the assessment order, this would not by itself lead to the conclusion that the order of the Assessing Officer called for interference and revision.*

e) *The Commissioner cannot initiate proceedings with a view to start fishing and roving inquiries in matters or orders which are already concluded; that the department cannot be permitted to begin fresh litigation because of new views they entertain on facts or new circumstance; that if this is permitted, litigation would have no end except when legal ingenuity is exhausted*

f) *Whether there was application of mind before allowing the expenditure in question has to be seen; that if there was an inquiry, even inadequate that would not by itself give occasion to the Commissioner to pass orders under Sec.263 merely because he has a different opinion in the matter; that it is only in cases of lack of inquiry that such a course of action would be open; that an assessment order made by the Income Tax Officer cannot be branded as erroneous by the Commissioner simply because, according to him, the order should have been written more elaborately; there must be some prima facie material on record to show that the 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.*

g) *The power of the Commissioner under Sec.263 (1) is not Commissioner is entitled to examine any other records which are available at the time of examination by him and to take into consideration even those events which arose subsequent to the order of assessment.*

9.2. Now we examine the following judgements. :-

It was held that revisionary power u/s 263 is conferred on the Commissioner/Director of Income Tax when an order passed by the lower authority is erroneous and prejudicial to the interest of the Revenue. Orders which are passed without inquiry or investigation are treated as erroneous and prejudicial to the interest of the Revenue, but orders which are passed after inquiry/investigation on the question/issue are not per se or normally treated as erroneous and prejudicial to the interest of the Revenue because the revisionary authority feels and opines that further inquiry/investigation was required or deeper or further scrutiny should be undertaken.

INCOME TAX OFFICER vs. DG HOUSING PROJECTS LTD343 ITR 329 (Delhi)

Revenue does not have any right to appeal to the first appellate authority against an order passed by the Assessing Officer. S. 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 expression "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.

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.

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 s. 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 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 CIT 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 though 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 a fresh 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 s. 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.

This distinction must be kept in mind by the CIT while exercising jurisdiction under s. 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. It may be noticed 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. 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.

COMMISSIONER OF INCOME TAX vs. J. L. MORRISON (INDIA) LTD. 366 ITR

As regard the submission on behalf of the Revenue that power under Section 263 of the Act can be exercised even in a case where the issue is debatable, it was held that the case of CIT vs. M. M. Khambhatwala was not applicable. The observation that the Commissioner can exercise power under Section 263 of the Act even in a case where the issue is debatable was a mere passing remark which is again contrary to the view taken by the Apex Court in the case of Malabar Industrial Company Ltd. & Max India Ltd. If the Assessing Officer has taken a possible view, it cannot be said that the view taken by him is erroneous nor the order of the Assessing Officer in that case can be set aside in revision. It has to be shown unmistakably that the order of the Assessing Officer is unsustainable. Anything short of that would not clothe the CIT with jurisdiction to exercise power under Section 263 of the Act. CIT vs. M. M. Khambhatwala reported in 198 ITR 144; CIT vs. Ralson Industries Ltd. reported in 288 ITR 322 (SC), not applicable; Malabar Industrial Co. Ltd. v. CIT reported in 243 ITR 83, relied on.

(Para 72)

As regard the third question as to whether the assessment order was passed by the Assessing Officer without application of mind, it was held that the Court has to start with the presumption that the assessment order was regularly passed. There is evidence to show that the assessing officer had required the assessee to answer 17 questions and to file documents in regard thereto. It is difficult to proceed on the basis that the 17 questions raised by him did not require application of mind. Without application of mind the questions raised by him in the annexure to notice under Section 142 (1) of the Act could not have been formulated. The Assessing Officer was required to examine the return filed by the assessee in order to ascertain his income and to levy appropriate tax on that basis. When the Assessing Officer was satisfied that the return, filed by the assessee, was in accordance with law, he was under no obligation to justify as to why was he satisfied. On the top of that the Assessing Officer by his order dated 28th March, 2008 did not adversely affect any right of the assessee nor was any civil right of the assessee prejudiced. He was as such under no obligation in law to give reasons. The fact, that all requisite papers were summoned and thereafter the matter was heard from time to time coupled with the fact that the view taken by him is not shown by the revenue to be erroneous and was also considered both by the Tribunal as also by us to be a possible view, strengthens the presumption under Clause (e) of Section 114 of the Evidence Act. A prima facie evidence, on the basis of the aforesaid presumption, is thus converted into a conclusive proof of the fact that the order was passed by the assessing officer after due application of mind. Meerut Roller Flour Mills Pvt. Ltd. vs. C.I.T., ITA No. 116 /Coch/ 2012; CIT vs. Infosys Technologies Ltd., 341 ITR 293 (Karnataka); S.N. Mukherjee vs. Union of India, AIR 1990 SC 1984; A. A. Doshi vs. JCIT, 256 ITR 685; Hindusthan Tin Works Ltd. Vs. CIT, 275 ITR 43 (Del), distinguished.

(Paras 90-92, 102)

COMMISSIONER OF INCOME TAX vs. SOHANA WOOLLEN MILLS 296 ITR 238 (P&H HC)

A reference to the provisions of s. 263 shows that jurisdiction thereunder can be exercised if the CIT finds that the order of the AO was erroneous and prejudicial to the interest of

Revenue. Mere audit objection and merely because a different view could be taken, were not enough to say that the order of the AO was erroneous or prejudicial to the interest of the Revenue. The jurisdiction could be exercised if the CIT was satisfied that the basis for exercise of jurisdiction existed. No rigid rule could be laid down about the situation when the jurisdiction can be exercised. Whether satisfaction of the CIT for exercising jurisdiction was called for or not, has to be decided having regard to a given fact situation. In the present case, the Tribunal has held that the assessee had disclosed that out of sale consideration, a sum of Rs. 1 lakh was to be received for sale of permit. If that is so, there was no error in the view taken by the AO and no case was made out for invoking jurisdiction under s. 263.

10. In view of the above discussion and applying the proposition of law laid down in the above case law to the facts of the case on hand, we have to necessarily hold that the exercise of revisionary power by the Id. Pr. CIT, u/s 263 of the Act, is bad in law. Hence we quash the same.

11. In the result, appeal of the assessee is allowed.

Kolkata, the 18th day of March, 2020.

Sd/-
[Aby T. Varkey]
Judicial Member

Dated : 18.03.2020
{SC SPS}

Sd/-
[J. Sudhakar Reddy]
Accountant Member

Copy of the order forwarded to:

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2. Pr. Commissioner of Income Tax-12, Kolkata

3.CIT(A)-

4. CIT- ,

5. CIT(DR), Kolkata Benches, Kolkata.

True copy
By order

Assistant Registrar
ITAT, Kolkata Benches