

IN THE INCOME TAX APPELLATE TRIBUNAL
"A" BENCH : BANGALORE

BEFORE SHRI B.R BASKARAN, ACCOUNTANT MEMBER AND
SHRI GEORGE GEORGE K

ITA No.140 to 142/Bang/2021

Assessment year : 2013-14 – 2015-16

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| M/s Sree Shivalingeshwara arecanut Traders, 21, L Block, APMC Yard, Shivamogga-577 204. PAN – AALFS 3372 E | Vs. | 1. The Principal Commissioner of Income-tax [Central], Bengaluru. 2. The Dy. Commissioner of Income-tax, Central Circle, Mysuru. PAN – AALFS 3372 E |
| APPELLANT | | RESPONDENT |

| | | |
|-------------|---|--------------------------------------|
| Assessee by | : | Shri V Srinivasan, Advocate |
| Revenue by | : | Shri Sumer Singh Meena, CIT (DR OSD) |

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|-----------------------|---|------------|
| Date of hearing | : | 07.12.2021 |
| Date of Pronouncement | : | 07.12.2021 |

ORDER

PER BENCH:-

The assessee has filed these appeals challenging the orders passed u/s 263 of the Income-tax Act,1961 ['the Act' for short] for the assessment years 2013-14 to 2015-16 by Ld Principal CIT (PCIT). The assessee is challenging the validity of revision of order passed by Ld. PCIT.

2. The facts relating to the case are stated in brief. The assessee is a partnership firm and is engaged in the business of trading in Arecanut. The A.O. completed the assessment of all these 3 years

u/s 143(3) r.w.s. 153A of the Act, consequent to the search operations conducted in the hands of the assessee on 24.11.2015. The A.O., while completing the assessment, had made addition of "Profit on unaccounted sales" in all the 3 years. Unaccounted turnover was determined by the A.O. on the basis of certain incriminating materials found during the course of search. The seized material consisted of papers wherein receipts and payments have been noted down. Before the search officials, the assessee explained the transactions of receipt of cash represent both accounted and unaccounted sale proceeds. The assessee also collated details of unaccounted sales for the three years under consideration. It also agreed to offer gross profit from unaccounted sales. The gross profit rate as declared in the books of accounts was adopted. The relevant details are tabulated below:-

| Assessment year | Unaccounted Sales | G.P Rate | Gross Profit |
|-----------------|-------------------|----------|--------------|
| 2013-14 | 5,13,01,400 | 1.26% | 6,46,000 |
| 2014-15 | 7,32,98,380 | 1.82% | 13,34,500 |
| 2015-16 | 24,19,34,050 | 1.51% | 36,29,100 |

The assessee offered above said gross profit as additional income in its return of income filed for all the three years. The AO also accepted the same in all the three years.

3. The Ld. PCIT examined the assessment record and took the view that the A.O. should have ascertained the profit by considering

unaccounted purchases and unaccounted sales noted down in the seized materials. Accordingly, he took the view that the A.O. has made the addition without making any enquiry or verification regarding the source of unaccounted purchases. He also took the view that estimation of the gross profit at the rates stated above, without ascertaining profit from unaccounted purchases and unaccounted sales is erroneous and prejudicial to the interests of revenue. Accordingly, the Ld PCIT initiated revision proceedings u/s 263 of the Act.

4. The assessee submitted before Ld. Principal CIT as under:-
- a) *The gross profit on the unaccounted turnover was admitted u/s 132(4) and accepted by the ADIT (Inv).*
 - b) *The gross profit on the unaccounted turnover was admitted before the Assessing Officer and accepted by him.*
 - c) *The notings in the “seized material” does not include any payment towards unaccounted purchases.*
 - d) *There is no investment in this line of trade as the sale proceeds of the sale of arecanut was used to make the payments towards unaccounted purchases.*
 - e) *A copy of the seized material and the statement identifying the unaccounted sales and unaccounted purchases be furnished for filing additional submissions.”*

Accordingly, the assessee contended that the impugned assessment orders cannot be considered to be erroneous and prejudicial to the interest of revenue. The Ld. Principal CIT did not accept the contentions of the assessee and accordingly set aside the assessment orders passed by the A.O. for all the 3 years under

consideration and directed the A.O. to pass fresh assessment orders de-novo by taking into account all the entries recorded in the seized documents. The assessee is aggrieved.

5. The Ld A.R submitted that the Ld PCIT was not justified in invoking revision proceedings for the years under consideration merely for the reason that he has entertained different view on the manner of computation of profit from alleged unaccounted sales. He submitted that the entries noted down in the seized materials do not indicate payment for any accounted purchases. The payment transactions consisted of payments of other nature and there was no noting about unaccounted purchases. Before the search officials the assessee has collated the details of unaccounted sales only from the transactions of “receipts of money” shown in the seized materials. Since the assessee could not have sold the materials without purchasing them, the assessee agreed to offer gross profit on the unaccounted sales, which has been accepted by the search officials and also by the AO in all the three years. For this purpose, the assessee has adopted the rate of gross profit shown in the books of account. He reiterated that the noting made in the seized material do not contain any details relating to alleged unaccounted purchases. He further submitted that the AO has, since passed the consequential order to give effect to the revision order passed by Ld PCIT. After examination of seized materials, the AO also could not identify the details of unaccounted purchases from them. Hence he has proceeded to estimate the income from unaccounted sales @ 50% of the sales value. He submitted that the action of the AO only shows that the direction given by Ld PCIT to determine gross profit

from seized materials is not capable of implementation. Hence the view of Ld PCIT that the AO should have computed profit on the basis of unaccounted purchases and unaccounted sales is not based on the seized materials, but represent his views only.

6. The Ld A.R further submitted that Ld PCIT cannot substitute his views to the plausible view taken by the AO. In support of this contention, he placed his reliance on the decision rendered by Hon'ble Bombay High Court in the case of CIT vs. Gabriel India Ltd (203 ITR 108)(Bom). In any case, the AO has taken a plausible view on this matter and hence the assessment order cannot be considered to be erroneous and prejudicial to the interests of revenue. In support of this proposition, he placed his reliance on the decision rendered by Hon'ble Supreme Court in the case of Malabar Industrial Co Ltd vs. CIT (243 ITR 83)(SC).

7. On the contrary, the Ld D.R submitted that the assessee has admitted in the statement taken from one of its partners that the money transactions noted down in the seized materials consisted of unaccounted transactions also. However, the AO has failed to examine the details of unaccounted purchases, investment made in purchasing those stock and further the AO also failed to compute gross profit from the seized materials considering both unaccounted purchases and unaccounted sales. Accordingly, the Ld DR supported the orders passed by Ld PCIT.

8. We heard the parties and perused the record. The scope of revision proceedings initiated under section 263 of the Act was

examined by Hon'ble Bombay High Court, in the case of Grasim Industries Ltd. V CIT (321 ITR 92) by taking into account the law laid down by the Hon'ble Supreme Court. The relevant observations are extracted below:

Section 263 of the Income-tax Act, 1961 empowers the Commissioner to call for and examine the record of any proceedings under the Act and, if he considers that any order passed therein, by the Assessing Officer is erroneous in so far as it is prejudicial to the interests of the Revenue, to pass an order upon hearing the assessee and after an enquiry as is necessary, enhancing or modifying the assessment or cancelling the assessment and directing a fresh assessment. The key words that are used by section 263 are that the order must be considered by the Commissioner to be "erroneous in so far as it is prejudicial to the interests of the Revenue". This provision has been interpreted by the Supreme Court in several judgments to which it is now necessary to turn. In *Malabar Industrial Co. Ltd. v. CIT* [2000] 243 ITR 83, the Supreme Court held that the provision "cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer" and "it is only when an order is erroneous that the section will be attracted". The Supreme Court held that an incorrect assumption of fact or an incorrect application of law, will satisfy the requirement of the order being erroneous. An order passed in violation of the principles of natural justice or without application of mind, would be an order falling in that category. The expression "prejudicial to the interests of the Revenue", the Supreme Court held, it is of wide import and is not confined to a loss of tax. What is prejudicial to the interest of the Revenue is explained in the judgment of the Supreme Court (headnote) :

"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."

The principle which has been laid down in *Malabar Industrial Co. Ltd.* [2000] 243 ITR 83 (SC) has been followed and explained in a subsequent judgment of the Supreme Court in *CIT v. Max India Ltd.* [2007] 295 ITR 282."

9. The Hon'ble Bombay High Court has also explained the scope of revision proceedings in the case of *CIT vs. Gabriel India Ltd* (203 ITR 108) as under:-

"9. From a reading of sub-section (1) of [section 263](#), it is clear that the power of suo motu revision can be exercised by the Commissioner only if, on examination of the records of any proceedings under this Act, he considers that any order passed therein by the Income-tax Officer is "erroneous in so far as it is prejudicial to the interests of the Revenue". It is not an arbitrary or unchartered power. It can be exercised only on fulfilment of the requirements laid down in sub-section (1). The consideration of the Commissioner as to whether an order is erroneous in so far as it is prejudicial to the interests of the Revenue, must be based on materials on the record of the proceedings called for by him. If there are no materials on record on the basis of which it can be said that the Commissioner acting in a reasonable manner could have come to such a conclusion, the very initiation of proceedings by him will be illegal and without jurisdiction. The Commissioner cannot initiate proceedings with a view to starting fishing and roving enquiries in matters or orders which are already concluded. Such action will be against the well-accepted policy of law that there must be a point of finality in all legal proceedings, that stale issues should not be reactivated beyond a particular stage and that lapse of time must induce repose in and set at rest judicial and quasi-judicial controversies as it must in other spheres of human activity. ([See Parashuram Pottery Works Co. Ltd. v. ITO](#)).

10. As observed in [Sirpur Paper Mills Ltd. v. ITO](#) by Raghuveer J. (as his Lordship then was), *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 circumstances. If this is permitted, litigation would have no end, "except when legal ingenuity is exhausted". To do so, is ". . . to divide one argument into two and to multiply the litigation".

11. The power of suo motu revision under subsection (1) is in the nature of supervisory jurisdiction and the same can be exercised only if the circumstances specified therein exist. Two circumstances must exist to enable the Commissioner to exercise power of revision under this subsection, viz., (i) the order is erroneous; (ii) by virtue of the order being erroneous prejudice has been caused to the interests of the Revenue. It has, therefore, to be considered firstly as to when an order can be said to be erroneous. We find that the expressions "erroneous", "erroneous assessment" and "erroneous judgment" have been defined in Black's Law Dictionary. According to the definition, "erroneous" means "involving error; deviating from the law". "Erroneous assessment" refers to an assessment that deviates from the law and is, therefore, invalid, and is a defect that is jurisdictional in its nature, and does not refer to the judgment of the Assessing Officer in fixing the amount of valuation of the property. Similarly, "erroneous judgment" means "one rendered according to course and practice of court, but contrary to law, upon mistaken view of law; or upon erroneous application of legal principles".

12. From the aforesaid definitions it is clear that an order cannot be termed as erroneous unless it is not in accordance with law. If an Income-tax Officer acting in accordance with law makes a certain assessment, the same cannot be branded as erroneous by the Commissioner simply because, according to him, the order should have been written more elaborately. This section does not visualise a case of substitution of the judgment of the Commissioner for that of the Income-tax Officer, who passed the order unless the decision is held to be erroneous. Cases may be visualised where the Income-tax Officer while making an assessment examines the accounts, makes enquiries, applies his mind to the facts and circumstances of the case and determines the income either by accepting the accounts or by making some estimate himself. **The Commissioner, on perusal of the records, may 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. That would not vest the Commissioner with power to re-examine the accounts and determine the income himself at a**

higher figure. It is because the Income-tax Officer has exercised the quasi-judicial power vested in him in accordance with law and arrived at conclusion and such a conclusion cannot be termed to be erroneous simply because the Commissioner does not feel satisfied with the conclusion. It may be said in such a case that in the opinion of the Commissioner the order in question is prejudicial to the interests of the Revenue. But that by itself will not be enough to vest the Commissioner with the power of suo motu revision because the first requirement, viz., that the order is erroneous, is absent. Similarly, if an order is erroneous but not prejudicial to the interests of the Revenue, then also the power of suo motu revision cannot be exercised. Any and every erroneous order cannot be the subject-matter of revision because the second requirement also must be fulfilled. There must be some prima facie material on record to show that tax which was lawfully exigible has not been imposed or that by the application of the relevant statute on an incorrect or incomplete interpretation a lesser tax than what was just has been imposed.”

10. We shall now examine the issues applying the legal principles discussed above. A perusal of the assessment order would show that the assessing officer has discussed in detail about the unaccounted sales in paragraph 5 to 5.5 of the assessment order. Hence it cannot be said that the assessing officer did not make any enquiry on the impugned issue. We notice that the AO has taken a conscious decision to adopt the Gross profit rate declared by the assessee in its books of account for estimating the income from unaccounted sales.

11. The Ld PCIT has taken the view that the AO should have computed the gross profit on the basis of entries found in the seized materials. Accordingly, he has taken the view that AO has passed the assessment order without making enquiries or verification which should have been done. During the course of hearing, the Ld A.R took us through the copies of seized materials furnished in the

paper book and submitted that the details of unaccounted purchases could not be collated from those transactions. The Ld A.R also drew our attention to the consequential order passed by the AO to give effect to the revision order passed u/s 263 of the Act. A perusal of the same would show that the AO also could not collate the details of unaccounted purchases from the seized materials, meaning thereby, the AO also could not compute gross profit as observed by Ld PCIT in the consequential order. The fact remains that the assessee has collated the details of unaccounted sales from the seized record and agreed to offer gross profit thereon, since the assessee could not have sold the materials without purchasing them. We notice that the assessing officer has not commented upon the payments noted in the seized materials. The Ld A.R also submitted that the tax authorities have not considered the cash payments are towards purchases.

12. Accordingly, we notice that it is nobody's case that the cash payment represents unaccounted purchases as presumed by Ld PCIT. In that case, the AO could not have computed gross profit on the basis of entries noted in the seized materials. Under these set of facts, one of the courses of action available with the AO is to estimate profit from the unaccounted sales. Since the assessee could not have sold materials without purchasing them, only profit element may be assessed. Thus, the AO has estimated the income and assessed the same in the hands of the assessee in all the three years. Thus, we notice that the AO has adopted one of the possible views in this matter. As held by Hon'ble Supreme Court in the case of Malabar Industrial Company (supra), if the AO has taken one of

the possible views, then the same would not make the assessment order prejudicial to the interests of revenue.

13. We notice that the PCIT has held the assessment orders to be erroneous for the reason that the AO should have estimated income from unaccounted sales at a higher figure. Thus it is case where Ld PCIT is having a different view on the manner of estimation of income from unaccounted sales. As held by Hon'ble Bombay High Court in the case of Gabriel India Ltd (supra), the view so entertained by Ld PCIT would not give him power u/s 263 of the Act to initiate revision proceedings, since the view of the AO cannot be termed as erroneous.

14. In view of the foregoing discussions, we are of the view that the impugned assessment orders cannot be termed as erroneous and prejudicial to the interests of revenue. Accordingly, Ld PCIT was not justified in invoking revision proceedings in all the three years under consideration. Accordingly we set aside the revision orders passed by Ld PCIT in all the three years under consideration.

15. In the result, all the three appeals of the assessee are allowed.

Order pronounced in the open court on 7th December 2021.

Sd/-
(George George K)
Judicial Member

Sd/-
(B.R Baskaran)
Accountant Member

Bangalore,
Dated, 7th December 2021

/ vms /

Copy to:

1. The Applicant
2. The Respondent
3. The CIT
4. The CIT(A)
5. The DR, ITAT, Bangalore.
6. Guard file

By order

Asst. Registrar, ITAT, Bangalore

- . Date of Dictation
2. Date on which the typed draft is placed
before the dictating Member
Date on which the approved draft comes to Sr.P.S
3.
4. Date on which the fair order is placed
before the dictating Member
5. Date on which the fair order comes back to the Sr.
P.S.
6. Date of uploading the order on
website.....
7. If not uploaded, furnish the reason for doing so
.....
8. Date on which the file goes to the Bench Clerk
.....
9. Date on which order goes for Xerox &
endorsement.....
10. Date on which the file goes to the Head Clerk
.....
11. The date on which the file goes to the Assistant
Registrar for signature on the order
.....
12. The date on which the file goes to dispatch section for
dispatch of the Tribunal Order
13. Date of Despatch of Order.
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