

**IN THE INCOME TAX APPELLATE TRIBUNAL  
KOLKATA BENCH "B" KOLKATA**

Before **Shri Mahavir Singh, Judicial Member** and  
**Shri Waseem Ahmed, Accountant Member**

<b>ITA No.241/Kol/2015</b> Assessment Year :2011-12
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Bridge & Building Construction Company Pvt Ltd., 90B, S.P.Mukherjee Road, Kolkata-700 026 <b>[PAN No. AADCB 0689 E]</b>	<b>V/s.</b>	CIT (Central-1), Aayakar Bhawan Poorva 110, Shantipally, Kolkata-700 107
अपीलार्थी /Appellant	..	प्रत्यर्थी/Respondent

अपीलार्थी की ओर से/By Appellant	Shri Manish Tiwari, AR
प्रत्यर्थी की ओर से/By Respondent	Shri Sachidananda Srivastava, CIT-DR
सुनवाई की तारीख/Date of Hearing	17-02-2016
घोषणा की तारीख/Date of Pronouncement	19-04-2016

**आदेश /O R D E R**

**PER Waseem Ahmed, Accountant Member:-**

This appeal by the assessee is arising out of order of Commissioner of Income Tax (Central-I), Kolkata M. No.CIT(C-I)/263/M/s Bridge & Building Cons.(P) Ltd 14-15/Kol/3399-607 dated 15.01.2015. Assessment was framed by DCIT,CC-XX, Kolkata u/s 143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') vide his order dated 28.03.2014 for assessment year 2011-12. Grounds raised by assessee is reproduced below:-

*"1. That on the facts and in the circumstances of the case, Ld. CIT (Central)-1, Kolkata has erred in initiating proceeding U/s. 263 of Income Tax Act.*

*2. That on the facts and in the circumstances of the case, Ld. CIT (Central)-1, Kolkata has erred in holding that assessment order U/s 143(3) of Income Tax*

*Act, 1961 dated 28.03.2014 is erroneous & prejudicial to the interest of revenue.*

*3. That on the facts and in the circumstances of the case, Ld. CIT (Central)-1, Kolkata has erred in setting aside order U/s 143(3) dated 28.03.2014 by relying on the decision of Rampyari Devi Saraogi – Vs – CIT, 67 ITR 84(SC)*

*4. That on the facts and in the circumstances of the case, Ld. CIT (Central)-1, Kolkata has erred in passing order U/s 263 dated 15.01.2015 by relying upon irrelevant & extraneous circumstances*

*5. That on the facts and in the circumstances of the case, Ld. CIT (Central)-1, Kolkata has erred in not appreciating the facts properly that the AO conducted detailed enquiry by issuing notices U/s 133(6) and only after getting proper response to such notices the AO framed assessment U/s 143(3).*

*6. That on the facts and in the circumstances of the case, Ld. CIT (Central)-1, Kolkata has erred in passing order U/s 263 mechanically without proper application of mind.”*

2. Issue raised in all the grounds of appeal by assessee is that Ld. CIT u/s 263 of the Act erred in holding the assessment order passed by Assessing Officer as erroneous and prejudicial to the interest of Revenue.

The fact in brief are that assessee in the instant appeal, is a Private Limited Company engaged in contractual business. In this case, some information was received from ACIT, Range-8, New Delhi regarding the present assessee that he had provided accommodation entries to M/s Skyline Engineering Contracts (India) Pvt. Ltd. Accordingly the Ld. ACIT, New Delhi requested to issue notice u/s. 131(1)(d) of the Act to DCIT, CG-XX, Kolkata to verify the genuineness of assessee's business by making field enquiries. However, Ld. CIT found that no such inquiry has been conducted. Besides the above in the instant case, assessee was paid a sum of ₹16,86,87,593/- for undertaking earth work for development of agricultural land by M/s Skyline Engineering Contracts (India) Pvt. Ltd. Accordingly, Ld. CIT opined that order passed by AO is erroneous and prejudicial to the interest of revenue, hence, Ld. CIT issued notice u/s 263 of the Act on the following points:-

- a) That AO failed to make necessary inquiries as required by Ld. ACIT, New Delhi u/s. 131(1)(d) of the Act for verifying the genuineness of the assessee,
- b) That assessee has made payment to three parties (1) Upasana Distributors, (2) Anukul Fiscal Services Pvt. Ltd. and (3) Adventure India towards the sales promotion expenses, however, AO has not done any inquiry,
- c) That assessee has incurred an expense of ₹30,16,903/- towards repair and maintenance of its rented office. The assessee did not show any fixed asset in the name of its office building. Ld. CIT found that AO has not examined as to why assessee had invested such a huge amount of ₹ 30 lakh on rented building whereas rent charge showed in its profit and loss account, is merely of ₹ 7,200/- per annum,
- d) That there was information gathered from source of AIR that assessee has sold the property amounting to ₹ 3 crores but same fact has not been verified by AO from the office of sub registrar, Jaitaran, Rajasthan.

Accordingly, Ld. CIT opined that order of AO is erroneous and prejudicial to the interest of revenue. Thus the CIT issued notice u/s 263 of the Act. In response thereto, the assessee has submitted as under:-

- 1) That assessee attended the hearing several times at the time of assessment before Assessing Officer on and from Nov. 2013 to Mar. 2014. All relevant details regarding purchase, repair and maintenance and other assets and sale promotion and copy of Form 20B for showing capital was furnished at the time of framing assessment. The expenses incurred on purchase of materials were duly cross verified by service of notice issued u/s 133(6) of the Act by AO. Therefore, assessment was completed after detailed inquiry and examination of all relevant materials.

- 2) The reason expressed in the show cause notice that the assessee might have indulged in giving accommodation entries cannot be a valid ground for initiation of proceedings under section 263 because of suspicion and surmises.
- 3) Regarding sale of property assessee has given an affidavit that no such property was sold during the relevant year.

However, Id. CIT disregarded the claim of assessee by observing as under:-

- i) Hon'ble Supreme Court in the case of *Malabar Industrial Co. Ltd. v. CIT* (2000) 243 ITR 83 (SC) the Id. CIT can pass order under section 263 of the Act even if there is a debatable issue. The Hon'ble Apex Court has further held that where AO has accepted entry in the statement of account filed by the assessee and in the absence of any supporting material and without making any enquiry, the commissioner under section 263 of the Act can exercise jurisdiction.
- ii) The claim of assessee is that the books of account of assessee were produced before AO at the time of assessment is not correct. As per the examination of assessment records, the assessee has produced its books of account on 28.03.2014 and AO passed assessment order on the same date. Therefore, it is clear and beyond doubt that AO has not examined or carried out necessary inquiries or investigation as required.
- iii) That there was no inquiry u/s. 131(1)(d) of the Act as required by ACIT, New Delhi regarding the genuineness of assessee's business activities. But from the record, it revealed that no such inquiry was conducted by AO. In this case, Ld. CIT relied in the case of *Rampyari Devi Saroogi v. CIT* 67 ITR 84 (SC);
- iv) Since the books of account of assessee were produced before AO on 28.03.2014 and AO passed order on same date, hence, it is clear that sales promotion expense shown by assessee has not been verified by AO.

- v) That AO has relied on the affidavit submitted by assessee regarding the sale of property for an amount of ₹ 3 crore. However, AO should have taken the registered documents of the sold property in question from sub-registrar of Rajasthan. So it is very much apparent that the AO failed to collect the required information and necessary inquiry has not been done by the AO. In this connection, Ld. CIT u/s. 263 of the Act relied on the judgment of Hon'ble Delhi High Court in the case of *Gee Vee Enterprises v. ACIT 99 ITR 375 (Del)*;
- vi) That AO who has done the assessment, has also admitted that the necessary inquiries were not made in relation to the assessment due to non-cooperation on the part of the assessee.

In view of above, Ld. CIT passed order u/s. 263 of the Act is erroneous and prejudicial to the interest of Revenue.

3. Aggrieved, assessee preferred an appeal before us.

Shri Manish Tiwari, Ld Authorized Representative appearing on behalf of assessee and Shri Sachidananda Srivastava, Ld. Departmental Representative appearing on behalf of Revenue.

The Id. AR submitted before us that the assessment was framed by the AO after due verification and detailed enquiry and relied on the order of AO. On the contrary the Id. DR strongly relied on the order of the Id. CIT.

4. We have heard rival contentions and perused the materials available on records. From the aforesaid discussion we find that the Id. CIT treated the order of the AO erroneous in so far as it is prejudicial to the interest of revenue. It is because that the AO has not verified the expenses in details. Besides there were some information from New Delhi income tax office for checking the genuineness of the assessee activities as he might have

indulged in providing accommodating entries. And this fact was not verified by the concern income tax officer. There was some sale of the properties which were not disclosed in the income tax return. Therefore the Id. CIT held the order erroneous in so far prejudicial to the interest of Revenue. Now to arrive at the correct conclusion of the case, we deem it necessary to reproduce the relevant provisions of section 263 of the Act.

*(1) The [ Principal Commissioner or] Commissioner may call for and examine the record of any proceeding under this 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, he, my, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment....”*

The sum and substance of the above reproduced section 263(1) can be summarized in the following points:-:

- 1) The commissioner may call to examine the record of any proceeding under the Act;
- 2) If he considers that the order passed by the AO is
  - (i) Erroneous; and
  - (ii) Is prejudicial to the interest of Revenue;
- 3) He has to give an opportunity of hearing in this respect to the assessee; and
- 4) He has to make or cause to make such enquiry as he deems necessary;
- 5) He may pass such order thereon as the circumstances of the case justify including,
  - (i) An order enhancing or,
  - (ii) Modifying the assessment or
  - (iii) Cancelling the assessment and directing a fresh assessment.

4.1 Now in the light of the above words, we have to examine as to whether the order of the Id. CIT is a valid order in the light of the above stated points/

provisions of section 263 of the Act. In the present case in hand, we find that the learned CIT has treated the order of the AO erroneous and prejudicial to the interest of the Revenue on account of four reasons. The first reason was that the AO could not verify the genuineness of the assessee in accordance with the query raised from the office of income tax- Delhi. The query was raised that the assessee might be engaged in providing accommodation entries to M/s Skyline engineering contracts India private Limited. So it was required by Delhi income tax office to verify genuineness of assessee's business by making field enquiries but it was not made by the AO. In our view this cannot be the reason to make an opinion that the order passed by the AO is erroneous and prejudicial to the interests of the revenue. This is because section 263 requires the Commissioner of income tax to consider the order erroneous after examining the records of the proceedings. Here in this case no record of the assessee has been called and examined for holding the order erroneous, therefore we disagree with the view of the Id. CIT.

4.2 The 2<sup>nd</sup> and 3<sup>rd</sup> reason was that the assessee has claimed sales promotion expenses and repair & maintenance expenses without proper enquiry and examination of the records. However from the order of the AO we find that the assessee has produced books of accounts and other details which were test checked by the AO and thereafter the assessment order was framed. The CIT also alleged that the books of accounts were produced on the day i.e. 28<sup>th</sup> March 2014 and same day the order of assessment was passed. We again disagree with the view of CIT that the AO had short time for the verification of the books. In this connection we opined that it was the duty of the AO to carry out the assessment of the assessee in the manner as he deems fit in the interest of the Revenue. Accordingly the AO has done his job by framing the assessment on the assessee. However the CIT makes his opinion that the order passed by the AO was made in haste but failed to bring anything on record from the proceedings for holding the order of the AO erroneous and prejudicial to the interest of revenue. In this connection we rely

on the order of Hon'ble High Court of Allahabad in the case of *Principal Commissioner of Income Tax vs. M/s Ashok Handloom Factory Pvt. Ltd.* in **ITA No. 19 of 2016** dated 01.02.2016 wherein the Hon'ble High Court has held that it is settled law that the commissioner of income tax can exercise his jurisdiction u/s 263 of the Act only in cases where no enquiry is made by the Assessing Officer. In the instant case, it is admitted by the Income Tax Department that the Assessing Officer had made some enquiries though according to them it was not a proper enquiry. In view of the above we find no reason to hold the order of the AO erroneous and prejudicial to the interest of the Revenue.

4.3 The 4<sup>th</sup> reason was that as per the information collected from the source of AIR, the assessee has sold the property amounting to Rs. 3 crores but the assessee did not make any disclosure in the books of accounts. So the CIT treated the order of the AO erroneous and the prejudicial to the interest of the Revenue. However from the provisions of section 263 we find that the CIT was supposed to make such enquiries as he deems necessary before arriving to the conclusion that the order passed by the AO is erroneous and prejudicial to the interest of revenue. The CIT has failed to make or cause to make such enquiry as he deems necessary. The term deems necessary is open ended. There could be cases that the Commissioner can take a stand that there was no necessity to make such enquiry. If that is the case it should be specifically recorded that the facts emanating from the records requires no further enquiry to be made or cause to be made. However from the provision of the section 263 of the Act we find that the CIT is bound to make necessary enquiry before arriving at the conclusion that order is erroneous and prejudicial to the interest of Revenue. In the instant case the CIT should have enquired from the office of sub registrar jitaran, Rajasthan to ascertain whether there was any transaction of sale of the property. In our view the CIT held the order of AO erroneous and prejudicial to the interest of revenue without making necessary enquiry. Accordingly we are inclined to reverse the order of the CIT passed

under section 263 of the Act. We are also findings support from one of the decision of Hon'ble Bombay High Court in the case of **Commissioner Of Income-Tax vs Gabriel India Ltd. (1993) 203 ITR 108 (Bom)** wherein it was held that

*"We may now examine the facts of the present case in the light of the powers of the Commissioner set out above. The Income-tax Officer in this case had made enquiries in regard to the nature of the expenditure incurred by the assessee. The assessee had given detailed explanation in that regard by a letter in writing. All these are part of the record of the case. Evidently, the claim was allowed by the Income-tax Officer on being satisfied with the explanation of the assessee. Such decision of the Income-tax Officer cannot be held to be "erroneous" simply because in his order he did not make an elaborate discussion in that regard. Moreover, in the instant case, the Commissioner himself, even after initiating proceedings for revision and hearing the assessee, could not say that the allowance of the claim of the assessee was erroneous and that the expenditure was not revenue expenditure but an expenditure of capital nature. He simply asked the Income-tax Officer to re-examine the matter. That, in our opinion, is not permissible. Further inquiry and/or fresh determination can be directed by the Commissioner only after coming to the conclusion that the earlier finding of the Income-tax Officer was erroneous and prejudicial to the interests of the Revenue. Without doing so, he does not get the power to set aside the assessment. In the instant case, the Commissioner did so and it is for that reason that the Tribunal did not approve his action and set aside his order. We do not find any infirmity in the above conclusion of the Tribunal.*

*16. In the light of the foregoing discussion, we answer the question referred to us in the affirmative, that is, in favour of the assessee and against the Revenue."*

In view of the above and from the facts of the case that the order passed u/s 263 of the Act by the Id. CIT cannot be held to be sustainable in law and the same is accordingly set aside.

**5. In the result, assessee's appeal stands allowed.**

Order pronounced in the open court 19/04/2016

Sd/-  
(Mahavir Singh)  
(Judicial Member)  
Kolkata,

Sd/-  
(Waseem Ahmed)  
(Accountant Member)

\*Dkp

दिनांक:- 19/04/2016

कोलकाता ।

**आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-**

1. अपीलार्थी/Appellant-Bridge & Building Construction Co. Pvt. Ltd., 90B, S.P.Mukherjee  
Kolkata-700026
2. प्रत्यर्थी/Respondent-CIT (Central-I), Aaykar Bhawan, Poorva, 110, Shanti Pally, Kol-107
3. संबंधित आयकर आयुक्त / Concerned CIT Kolkata
4. आयकर आयुक्त- अपील / CIT (A) Kolkata
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, **कोलकाता** / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

By order/आदेश से,

/True Copy/

उप/सहायक पंजीकार  
आयकर अपीलीय अधिकरण,  
**कोलकाता ।**