IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA BENCH 'C', KOLKATA
(Before Shri P. M. Jagtap, A.M. & Shri S.S.Viswanethra Ravi, J.M.)

ITA No. 2222/Kol/2014 : Asstt. Year : 2010-2011

Usha Martin Telematics Ltd. PAN: AAACU 3054D	Vs	C.I.T., Kolkata-IV, Kolkata
(APPELLANT)		**(RESPONDENT)**

Appellant by : Shri Nageshwar Rao, Advocate
Respondent by : Shri G. Mallikarjuna, CIT,DR

Date of Hearing : 27.01.2016		**Date of Pronouncement :26-04-2016**

ORDER

Per Shri S.S.Viswanethra Ravi, J.M.

This is an appeal filed by the assessee against the order dated 12.08.2014 passed by the CIT-IV, Kolkata for the assessment year 2010-11 framed under section 263 of the I.T.Act.

2. The assessee raised the following grounds:

"Based on the facts and circumstances of the case and in law, the Appellant respectfully submits that the learned Commissioner ofIncome-tax - N, Kolkata ['CIT'] has erred in invalidly initiating the revisionary proceedings and passing an order under Section 263 of the Income-tax Act, 1961 ('Act'). In this regard, the Appellant respectfully craves leave to prefer an appeal under Section 253 of the Act against the order passed by the learned CIT under Section 263 of Act, on the following grounds:

Ground No 1 - Proceedings initiated under Section 263 of the Act are bad in law

The learned CIT has erred in initiating the revisionary proceedings under Section 263 of the Act and passing an order thereto.

a) Without appreciating the fact that the conditions laid down in Section 263 of the Act have not been satisfied, ie, the order passed by the learned

assessing officer should be both erroneous and prejudicial to the interest of the Revenue;

b) Without appreciating the fact that the material/information in relation to the notional foreign exchange gain transaction was already on record of the assessing officer while passing the assessment order under Section 143(3) of the Act for the subject year and revisionary proceedings have been initiated merely on account of change of opinion; and

c) Without giving any finding or reasons that the assessment order is erroneous and prejudicial to the interest of the revenue for treating the notional foreign exchange gain as being revenue in nature and accordingly taxable in the hands of the Appellant.

Ground no. 2 - Taxability of notional foreign exchange gain as being on revenue account

Without prejudice to the above, the learned CIT has erred in directing the assessing officer to conduct denovo assessment proceedings, without accepting the submissions of the Appellant that the notional foreign exchange gain arisen to UMTL on re-instatement of loan during the subject AY is on capital account, and accordingly not liable to tax.

Each of the above grounds are independent and without prejudice to one another.

It is prayed to Your Honour that the revisionary proceedings initiated by the learned CIT under section 263 of the Act being bad in law should be deleted.

The Appellant craves leave to add, to alter, to amend or to delete any or all of the above grounds of appeal, at or prior to hearing of the appeal, so as to enable the Honourable Income-Tax Appellate Tribunal to decide the appeal according to law."

3. The brief facts of the case are that the assessee is a company and engaged in financial services. The assessee filed its return of income declaring Rs.2,30,873/- as total income. Under scrutiny, the assessee having receipt of notice under section 143(2) of the Act filed all the details as required therein. The AO accepted the return of income as filed above and an assessment order dated 22.11.2012 was passed under section 143(3) of the Act.

4. The CIT-IV, exercising revisionary powers as contemplated under section 263 of the Act, found that the assessee got foreign exchange gain of Rs.31,16,05,186/- against the interest free loan of USD 5,00,00,000/- availed from Asian Telecommunication Investments (Mauritius) Ltd.

5. CIT-IV found that the assessee deducted the foreign exchange gain from the net profit under the normal provisions of the Act and the same was not reduced from net profit while computing the income under book profit under section 115JB of the Act. CIT-IV was of the view that the fluctuation in foreign exchange is revenue gain and the assessee is not entitled to adjust the same in computing the total income under the normal provisions of the Act. Accordingly, CIT-IV set aside the assessment order dated 27.11.2012 and directed the AO to examine the entire case *de novo* to work out taxable income as per law.

6. The question that arose for consideration before us, whether the CIT-IV properly exercised his jurisdiction in setting aside the assessment order without there being any finding as required under section 263 of the Act.

7. Heard both the sides and perused the materials available on record. The ld. Counsel for the assessee pointed out that the CIT-IV did not give his opinion on the order passed by the AO was erroneous in so far it is prejudicial to the interests of the Revenue. The ld. Counsel for the assessee relied on case laws in support of his contentions. The ld. DR relied on the order of the CIT. A reading of the order of CIT-IV suggests that he opined the fluctuation in foreign exchange resulting into gain is a revenue item and no adjustment is available on such gain in computing the total income under normal provisions of the Act. The AO, in his order, clearly stated that the case on hand was selected for scrutiny and notices under section 143(2) of the Act were issued and served on the assessee. The assessee filed all details as

required under scrutiny on various dates and the case was discussed and heard and ended up with an order under section 143(3) of the Act. It is found that it is not the finding of the CIT-IV that the AO did not conduct the assessment proceedings in accordance with procedure established under the Act. The finding of the CIT-IV refers that the assessment requires reconsideration with a direction to AO to examine the case de novo. The CIT-IV failed to point out as to what error was committed by the AO in accepting the foreign exchange gain deductible from the net profit while computing total income under the normal provisions of the Act.

8. A perusal of the order of CIT goes to establish that in response to the notice under section 263 of the Act, the AR representing the assessee appeared and filed the written submissions stating that the loan availed in foreign currency is part of its fixal capital and notional foreign exchange gain thereon on capital is not chargeable to tax. Having discussed and heard the case, the CIT-IV did not point out any error in assessment order, that the deduction of foreign exchange gain from normal provisions of the Act is erroneous, except stating that it requires reconsideration, that finding in our opinion is not tenable.

9. The case law relied on by the Ld. Counsel for assessee in the case of COMMISSIONER OF INCOME TAX vs. GABRIAL INDIA LTD of Hon'ble HIGH COURT OF BOMBAY reported in 203 ITR 1089 (Bom) where a reference made by the Tribunal as to "Whether, on the facts and in the circumstances of the case, the Tribunal was justified in setting aside the order passed by the CIT under s. 263 of the Act ?" The facts involved therein that the assessment of 1973-74, where the assessee-company had claimed deduction of a sum of Rs. 99,326 describing it as `Plant relayout Expenses'. It was explained by the assessee that it incurred in connection with the merger of two existing plants for the manufacturing of shock absorber which were located side by side at its factory at Mulund. According to the assessee, it was a business expenditure allowable as deduction in computation of his

income. The ITO accepted the explanation of the assessee and allowed the deduction as claimed by it. The CIT was of the view that the ITO had allowed the same on the presumption that it was revenue expenditure and Commissioner opined that the expenditure was in the nature of capital expenditure with out giving any specific finding regarding the order of AO is to how it was erroneous in so far as the prejudicial to the revenue. The Hon'ble High Court *supra* held as follows.

> ***15.*** *We may now examine the facts of the present case in the light of the powers of the Commissioner set out above. The ITO 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 ITO on being satisfied with the explanation of the assessee. Such decision of the ITO 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 ITO 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 a conclusion that the earlier finding of the ITO was erroneous and prejudicial to the interest 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 disapproved his action and set aside his order. We do not find any infirmity in the above conclusion of the Tribunal.*

10. In the present case also, as discussed above the CIT having written submissions filed by assessee on file and heard the case in detail did not point out any error in the assessment order and only stated that the case requires reconsideration. In our opinion, the facts contained in the aforesaid decision are similar and relying on the same we hold that the order of the CIT-IV is bad under law and consequently it is set aside.

11. Further on similar facts the Hon'ble HIGH COURT OF ALLAHABAD in the case of COMMISSIONER OF INCOME TAX vs. GOYAL PRIVATE FAMILY SPECIFIC TRUST reported in 171 ITR 0698 where the Hon'ble High Court rendered opinion Whether, on the facts and in view of the legal position the Tribunal could be said to be legally correct in setting aside the order passed under s. 263 by the CIT? The facts are that the assessee, Goyal Private Family Specific Trust for the benefit of the beneficiaries. The assessee filed returns claiming income in the hands of the trust is exempt and taxable in the hands of beneficiaries. The ITO completed the assessments. CIT, not being satisfied with the explanation of the assessee under Section 263 proceedings, the CIT set aside the assessment orders for both the years directing the ITO to make the assessments de novo. On appeal, the Tribunal set aside the order of the CIT. The Hon'ble High Court observed as under:

> *6. There is no finding by the CIT that the ITO reached an erroneous conclusion and that, on the facts and circumstances of the case, the conclusion would have been different. The orders of the ITO may be brief and cryptic, but that by itself is not sufficient reason to brand the assessment orders as erroneous and prejudicial to the interest of the Revenue. Writing an order in detail may be a legal requirement, but the order not fulfilling this requirement, cannot be said to be erroneous and prejudicial to the interest of the Revenue. It was for the CIT to point out as to what error was committed by the ITO in having reached the conclusion that the income of the trust was exempt in its hands and was assessable only in the hands of the beneficiaries. The Commissioner having failed to point out any error, no error can be inferred from the orders of the ITO for the simple reason that they are bereft of details. If the order is not erroneous, then it cannot be prejudicial to the interest of the Revenue. There is nothing to show in the order of the CIT that the ITO would have reached a different conclusion had he passed a detailed order. So, the conclusion of the CIT that the orders of the ITO are erroneous and prejudicial to the interest of the Revenue are based merely on suspicion and surmises in the absence of any enquiry having been made by him.*

12. In the present case also, as discussed above the CIT having reached the conclusion that the assessee is not entitled to adjust foreign exchange gain while computing the total income and did not mention anything in his order that the order of AO suffered any error and it is prejudicial to the interest of revenue, except mentioning the case requires reconsideration. In our opinion, the facts contained in the aforesaid decision are similar and applicable to the case on hand and relying on the same we hold that the order of the CIT is bad under law and consequently it is set aside.

13. The Hon'ble HIGH COURT OF PUNJAB & HARYANA in the case of COMMISSIONER OF INCOME TAX vs. R.K. METAL WORKS reported in 112 ITR 0445 a question has been referred "Whether, on the facts and in the circumstances of the case, the Tribunal was right in setting aside the order passed by the CIT under s. 263 of the Act". The CIT noticed that the assessment of the assessee for the year 1968-69 "was erroneous and prejudicial to the interests of the Revenue inasmuch as he did not disallow the interest attributable to that part of the capital borrowed by the firm, which was not utilised for the purposes of the firm's business and advanced indirectly to two partners, Sarvashri Jugal Kishore and Roshan Lal, as investment in the properties". the CIT held that the order of the ITO was erroneous and prejudicial to the interests of the Revenue and directed the ITO to reframe the assessment. The Tribunal observed that the CIT had not given any reasons to justify his satisfaction that the order passed by the ITO was prejudicial to the interests of the Revenue. While dealing with the issue the The Hon'ble HIGH COURT opined as herein below:

> *2. A perusal of the order of the CIT clearly shows that the criticism of the Tribunal is well-founded. There is no indication in the order of the CIT as to the basis on which he came to the prima facie conclusion that the capital borrowed by the firm was utilised for purposes other than that of the firm's business. When the assessee filed a detailed written statement before him, the*

CIT did not deal with any of the points raised in the statement. He thought that the best course in the circumstances was to remand the matter to the ITO for consideration of the points raised in the assessee's written statement. That certainly was not the proper course to be adopted by him. It was necessary for the CIT to state in what manner he considered that the order of the ITO was erroneous and prejudicial to the interests of the Revenue and what the basis was for such a conclusion. After indicating his reasons for such a conclusion, it would certainly have been open to him to remand the matter to the ITO for such other investigation or enquiry as might be necessary. But that was not the course which the CIT pursued. The Tribunal was, therefore, justified in setting aside the order of the CIT. The learned counsel for the Revenue urged that, while setting aside the order of the CIT, the Tribunal had purported to restore the order passed by the ITO and this meant that the CIT was precluded from taking up the matter again. We do not want to express any opinion on this question, since our jurisdiction is confined only to answering the question referred to us. The question referred to us is answered in the affirmative. There will be no order as to costs.

14. In the present case also, in response to the notice U/S 263 of the Act, the assessee raised his contentions by way of a written submissions, having acknowledging the same on file, with out answering contentious issues therein came to a conclusion that the order of AO is erroneous and prejudicial to the interests of the Revenue. The facts in the aforesaid case also are similar to the facts case on hand and the law laid down by the Hon'ble High Court is clearly applicable to the case on hand.

15. The Hon'ble HIGH COURT OF PUNJAB & HARYANA in the case of COMMISSIONER OF INCOME TAX vs. KANDA RICE MILLS reported in 178 ITR 0446 The facts of the case are that the CIT found that the business loss of Rs. 30,000 was determined, after adjusting deductions under s. 80J of the Act and was allowed to be carried forward. By order the assessment made by the ITO was set aside with a direction to make fresh assessment on re-examining the points contained in paras 7 to 10 of his order. The Tribunal, Chandigarh Bench, came to the

conclusion that no firm conclusions were arrived at by the CIT in decisional jurisdiction and the order of the CIT was set aside. On these facts, the Tribunal has referred the question for the opinion of the Hon'ble High Court at the instance of the Revenue that "Whether, on the facts and in the circumstances of the case, the Tribunal is right in law in vacating the order of the CIT (A), Ludhiana, passed under s. 263 of the IT Act, 1961? The Hon'ble High Court answered above question as under:

> *7. A reading of the entire order of the CIT clearly goes to show that he did not furnish his opinion or consider the cited cases or the argument raised and merely observed that these were the points which deserved consideration and after setting aside the order of the ITO, issued a direction for making assessment afresh. This is not permissible under the provisions contained in s. 263 of the Act. The CIT had to come to a firm decision that the order of the ITO was erroneous and was prejudicial to the interests of the Revenue. Since no decision about the erroneous nature of the order was firmly taken, the Tribunal was right in vacating the order. Accordingly, we answer the question in favour of the assessee, that is, in the affirmative, with no order as to costs.*

16. On the case on hand, the order of the CIT does not show any firm reasons as required under section 263 of the Act to declare the assessment order was erroneous and was prejudicial to the interests of the Revenue, as observed above a direction was given to AO to work out the taxable income as per law. In our view it is against the established principles of law. Therefore, applying the ratio of aforesaid decision, we hold that the order dt:12-08-2014 passed by the CIT-IV is bad under law which is liable to be set aside.

17. In the light of above, Respectably following the same, we allow the ground no-1 raised by the assessee and in view of the decision on ground no-1 as above and ground no-2 needs no adjudication and hence , therefore it is dismissed.

18. In the result the appeal filed by the Assessee is allowed

Order Pronounced in the Open Court on 26th April, 2016.

Sd/-	**Sd/-**
(P.M.Jagtap)	(S.S.Viswanethra Ravi)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Dated: 26/04/2016

Talukdar/Sr.PS

Copy of order forwarded to:

1 Usha Martin Telematics Ltd., 8th floor, RDB Boulevard, Plot K-1, Block-EP & GP, Sector-V, Salt Lake City, Kolkata – 700 091
2 CIT, Kolkata-IV, Kolkata
3 The CIT(A),
4 CIT,
5 D.R.

True Copy, By order,

Asstt. Registrar**,** ITAT, Kolkata