

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

[Before Hon'ble Sri A.T.Varkey, JM & Shri M.Balaganesh, AM]

I.T.A No.901/Kol/2016

Assessment Year : 2011-12

M/s. AB (Wines) Stores
Kolkata
[PAN : AAJFA 6312 L]
(Appellant)

-vs.-

Pr. C.I.T., Kolkata-14
Kolkata

(Respondent)

For the Appellant : Shri S.K.Tulsiyan, Advocate

For the Respondent : Shri R.S.Biswas, CIT

Date of Hearing : 15.06.2017.

Date of Pronouncement : 07.07.2017

ORDER

Per M.Balaganesh, AM

1. This appeal of the assessee arises out of the order of the Learned Pr.Commissioner of Income Tax (Appeals) -14 , Kolkata [in short the ld CIT] in No. Pr.CIT-14/Kol/AB(Wine)/Sec.263/2015-16/6748-6750 dated 11.03.2016 passed u/s 263 of the Act against the order passed by the Jt.CIT, Range-37, Kolkata [in short the ld AO] under section 143(3) of the Income Tax Act, 1961 (hereinafter referred to as the 'Act '] dated 04.03.2014 for the Asst Year 2011-12.

2. The only issue to be decided in this appeal of the assessee is as to whether the ld CIT was justified in invoking revisionary jurisdiction u/s 263 of the Act in the facts and circumstances of the case.

3. The brief facts of this issue is that the assessee is a partnership firm engaged in the business of retail trading of Indian Made Foreign Liquor. The assessee filed its return of income for the Asst Year 2011-12 declaring total income of Rs 15,14,564/-. The case was selected for scrutiny. In the course of assessment proceedings, the assessee

furnished copies of cash book and party ledgers before the Id AO which were duly examined by the Id AO. The assessee produced details of creditors in support of its claim of purchases and the Id AO issued notices u/s 133(6) of the Act in order to verify the claim of the assessee. The Id AO observed that the assessee had made cash payments exceeding Rs 20,000/- on a single day in contravention of provisions of section 40A(3) of the Act and disallowed a sum of Rs 1,44,52,154/- in the assessment, ignoring the submissions of the assessee explaining the circumstances under which such cash payments were made. The said assessment was completed u/s 143(3) of the Act on 4.3.2014. The assessee preferred an appeal before the Id CITA against this order of assessment and the same is stated to be pending.

4. While this was so, the Id Administrative CIT sought to revise the assessment u/s 263 of the Act by treating the same as erroneous in as much as it is prejudicial to the interests of the revenue. The Id CIT issued show cause notice to the assessee vide letter dated 7 / 13.1.2016 on the ground that the Id AO had failed to make complete and full enquiries and also passed the order without considering & examining the facts and information on record. The Id CIT observed in his show cause notice that the Id AO had not examined the said transactions at the micro level and this lack of enquiry warrants further examination without which the provisions of section 40A(3) of the Act can't be applied on the facts of this case. Accordingly, he directed the assessee to produce the original books of accounts viz cash book, ledger to sustain that payment beyond Rs 1,44,52,174/- was made within the purview of section 40A(3) of the Act. The Id CIT also observed that during the course of assessment proceedings, the Id AO issued notice u/s 133(6) of the Act to the following parties for purchases made from them:-

Sl.No	Name of the purchase party
1.	M/s. B Deboo & Co.Pvt. Ltd.
2.	M/s BBM Enterprise
3.	M/s Mohan Brother (Drinks)Pvt. Ltd.
4.	M/s. N C Shaw & Co.
5.	M/s S P Shaw & Bros.

6.	M/ Shree Riddhi Siddhi
7.	M/s Sumo Son Exports Pvt.. Ltd.
8.	M/s Victoria Wines Pvt. Ltd.

4.1. The Id CIT observed that the Id AO had overlooked the replies received in response to notice u/s 133(6) of the Act. He observed that in respect of 5 cases to whom notice u/s 133(6) of the Act was issued, no reply was received from them. In respect of 3 cases where reply has been received, there is a difference in closing balance in party account due to difference in the opening balance in the said party account. The assessee was asked to furnish the reconciliation of above discrepancies of purchases with supporting evidences like party ledger, cash book, purchase bill etc.

4.2. The Id CIT observed that the figures of purchases are different as per the profit and loss account (Rs 4,66,29,230/-) and as per purchase parties list (Rs 4,73,29,301/-) provided by the assessee. He further observed that the TCS certificate issued by Raja Ram Yadav states that there is a purchase of Rs 40,38,080/- was made by the assessee which was not reflected in the parties list provided by the assessee to the tune of Rs 4,73,29,301/-. Accordingly he concluded that the total purchases of the assessee to be Rs 5,13,67,381/- (4,73,29,301 + 40,38,080) and whereas the purchases shown in the profit and loss account was Rs 4,66,29,230/- only, for which reconciliation was sought for by the Id CIT.

5. The assessee explained that the difference in purchases between purchase parties list and that shown in the profit and loss account was due to TCS amount of Rs 4,68,521/- and credit note given by the party in the sum of Rs 2,31,550/- which has been reduced in the profit and loss account towards purchases account. Hence there is no under reporting of purchases in the profit and loss account. It was also explained that there was no purchase of Rs 40,38,080/- from Raja Ram Yadav as stated by the Id CIT in his show cause notice during the Asst Year 2011-12. It was further stated that the issue of

disallowance u/s 40A(3) of the Act had been the subject matter of appeal before the Id CITA and the same is pending and hence the very same issue of section 40A(3) of the Act could not be the subject matter of discussion in revision proceedings u/s 263 of the Act.

6. The assessee further explained that the entire issue of purchases were duly examined by the Id AO in the course of assessment proceedings by issuing notice u/s 142(1) of the Act dated 4.10.2013 together with a questionnaire thereon by asking the following questions related to purchases :-

4. Names & current address of the persons / parties from whom goods were purchased stating categorically in each case, the opening balance as on 01.04.2010, purchase during the year, amount paid during the year & amount due to be paid as on 31.03.2011. (ledger copy of the parties to be furnished).

5. Copies of TCS certificates.

6.1. The assessee explained vide its reply letter dated 9.10.2013, among other details, before the Id AO and the relevant portions of the said letter are reproduced below:-

5. The firm is having a legal dispute with Federal Bank and the matter is lying in Debt Recovery Tribunal. Hence the firm is not in a position to carryout normal banking transaction. Transaction are made in cash only.

6. A statement of Sundry Creditors showing Op.Balance, Purchase during the year, payment during the year and closing balance for both the Assessment Year 2010-11 and 2011-12.

8. Copies of TCS Certificate of both the period i.e A.Y. 2010-11 & 2011-12 are enclosed.

6.2. The assessee also furnished the party wise reconciliation in a tabular form before the Id CIT explaining the discrepancy in purchases due to credit note issued by various

parties to the tune of Rs 2,31,550/- which is enclosed in page 13 of the paper book filed before us.

7. The assessee based on the aforesaid submissions stated that the Id AO had already made thorough enquiries on the subject mentioned issue of purchases and the sundry creditors thereon and hence the same cannot be construed as lack of enquiry warranting initiation of revision proceedings u/s 263 of the Act. It was argued that the Id AO on going through the details filed by the assessee and after deciding to disallow a sum of Rs 1,44,52,154/- u/s 40A(3) of the Act, had taken one of the possible views on the issue and hence the order passed by him thereon cannot be construed as erroneous and in the absence of satisfaction of twin conditions i.e order should be erroneous and it should be prejudicial to the interests of the revenue, the same cannot be revised u/s 263 of the Act. The Id CIT however, did not accept to these contentions of the assessee and finally held in his order dated 11.3.2016 as under:-

“6 (I) Regarding issue of applicability of provision of section 40A(3) of the Income Tax Act, 1961 on the cash payment having amount exceeding Rs. 20,000/- per payment/entry to purchase parties, Authorised representative of the assessee stated in his submission that "regarding violation of sec 40A(3), the matter is at Appeal stage". No further clarification/explanation was furnished by the assessee during the proceeding u/s 263 along with original cash book, party ledger to sustain that payment beyond Rs. 1,44,52,174 was made within the purview of sec. 40A(3) of the IT Act 1961. Therefore, the type and number of violations, amount paid and disallowable thereon could not determined.

It is a fact that the entire purchase of the assessee was admittedly made in cash, not routed through bank. In view of this fact the said transaction in connection with purchase needs to be re-examined at the micro level to check whether the other transaction over and above the disallowances of Rs. 1,44,52,174 pass the test of provisions u/s 40A(3) of the IT Act, 1961.

6(II) The Assessing Officer is directed to re-examine the issue of cash payment exceeding Rs. 20,000/- at the micro level which attract provision of section 40A(3) of the income tax Act.

6(III) Regarding the issue of discrepancy in replies u/s. 133(6) received from parties as stated in foregoing paragraph no. 2(11), the reply of the assessee during proceeding u/s 263 was " As per our record, there was no transaction with M/s BBM Enterprise during the Assessment 2011-12." In respect of other parties,

explanation/clarification/reconciliation was furnished by the assessee. Therefore, the discrepancy in replies u/s 133(6) could not be verified.

The Assessing Officer failed to conduct enquiries and investigations in the cases of sundry creditors and the discrepancies found in the opening and closing balances of the three creditors namely, M/s BBM enterprises, M/s N.C. shaw & co and M/s. Victoria Wines pvt. Ltd. Further, it is observed from the assessment record that the assessee firm has given an advance or Rs. 1,46,06,233/- to its partners without charging any interest. Whereas on perusal of the balance sheet, it is seen that capital of the partners in the firm is merely of (Rs. 96,347/- plus Rs. 1.02.375/-) Rs. 1,98,722/-. Meaning thereby, the assessee firm has no other source to finance the interest free advance to its partners except the liability shown in the name of sundry creditors for goods. Therefore, it can be seen that if the sundry creditors would have been genuine and existing, then in that case, the assessee might have paid them back as most of the creditors are shown to have coming as opening balances. But contrary to this, the assessee firm has shiphoned off the fund by financing interest free advance to partners. The doctrine of business prudence clearly demands that the nature and character of transaction shown in the name of sundry creditors must be thoroughly examined to ascertain their genuineness and existence.

6.(IV)The Assessing Officer is directed to examine the transaction with all the creditors as mentioned in point 2(II) above as well .as another creditors as shown by assessee during assessment u/s 143(3) by collecting information u/s 133(6). Where there 'was no transaction with any party during A.Y. 2011-12 & there was discrepancy in the opening balance and closing balance between the assessee and respective party, the Assessing Officer is directed to initiate proceeding for the relevant year as per provisions of the IT Act to examine the genuineness of the claim of assessee.

6.(V)Regarding discrepancy in purchase amount as mentioned in foregoing paragraph no 2(111), assessee submitted during proceeding u/s 263 that "the difference is due to a) T.C.S amount of Rs.468521/- b) credit note of Rs. 231550/-".But no corroborative evidence in support of T.C.S. mismatch or bills, ledger or any reconciliation statement of parties was produced during proceeding u/s 263. Therefore, the discrepancy in purchase could not be verified.

6.(VI) The Assessing Officer is directed to re-examine the above discrepancy in purchase with supporting bills, party ledger, reconciliation statement and other relevant documents.

7. It is a settled position of law that the failure to make enquiries which are called for on the facts of the case would itself make the assessment erroneous and prejudicial to the interest of revenue."

Finally the Id CIT observed in his order as under:-

“8. In view of facts as stated above, it is hereby held that assessment order u/s 143(3) of Income Tax Act, 1961 dated 04-03-2014 passed in this case for Assessment Year 2011-12 is erroneous and prejudicial to the interest of revenue. Consequently, in exercise of the power conferred as per the provisions of Sec. 263 of the Income Tax Act, 1961, the assessment order passed by the JCIT erstwhile Range-37, Kolkata (Now Range-40, Kolkata) u/s 143(3) of the Income Tax Act, 1961 dated 04-03-2014 is set-aside on the aforesaid specific issues and to the extent indicated in the foregoing paragraphs. The Assessing Officer is directed to pass a fresh assessment order and re-compute the assessee's income after making further enquiries as directed in the foregoing paragraphs and after giving due opportunity to the assessee & perusing the necessary evidence.”

8. Aggrieved, the assessee is in appeal before us on the following grounds:-

- “1. That the Ld. Principal CIT, Kolkata-14 on the facts and circumstances of the case and in law erred in assuming jurisdiction u/s. 263 of the Act in order to impose his own views on the AO. on the same set of facts & evidences considered by the A.O., by holding that the order passed by the AO. u/s. 143(3) of the Act on 04.03.2014 was erroneous inasmuch as it was prejudicial to the interest of revenue.
2. That, on the facts and in the circumstances of the case, the Ld. Pr. CIT erred in assuming jurisdiction u/s. 263 of the Act on the alleged ground of absence of thorough and proper inquiry by the A.O. and thus holding the assessment order passed u/s.143(3) of the Act to be erroneous and prejudicial to the interest of revenue simply by differing with the plausible view taken by the A.O.
3. That, the Ld. Principal CIT grossly erred on facts and in law in invoking jurisdiction u/s. 263 of the Act and referring the case back to the A.O. for fresh examination of disallowance u/s. 40A(3) of the Act even though the disallowance made in the impugned assessment order on the said issue is already a subject matter of appeal before the Ld. CIT(A) and the matter is thus debatable.
4. That, the Ld. Pr. CIT erred in not appreciating the circumstances under which the payment in the manner prescribed in sec. 40A(3) was not practicable or would have caused genuine problem to run the business smoothly, inasmuch as the assessee was prevented from transacting through banking channel due to litigation with its Bank which ultimately went to Debt Tribunal.
5. That, the Ld. Pr. CIT erred in alleging that the AO. failed to conduct enquiries of some of the sundry creditors against purchases in spite of the fact that after thorough scrutiny of the details of purchases, supporting bills, party ledger, books of accounts and after application of mind, the AO. accepted the purchases and moreover the alleged discrepancies pointed out by the Ld. Pr. CIT were also duly explained during 263 proceeding, warranting thus any scope of discrepancy in purchase account.

6. That as the order of Ld. Principal CIT on the above issues suffers from illegality and is devoid of any merit, the same should be quashed and your appellant be given such relief(s) as prayed for.

7. That the appellant craves leave to amend, alter, modify, substitute, add to, abridge and/ or rescind any or all of the above grounds.”

9. We have heard the rival submissions and perused the materials available on record. We find that the ld CIT had set aside the order of the ld AO by treating it as erroneous and prejudicial to the interests of the revenue. The short point that arises for our consideration is as to whether the order of the ld AO could be construed as erroneous in the facts and circumstances of the case. It is not in dispute that the ld AO had made verification of the purchases together with its sundry creditors in the original assessment proceedings by issuing a specific questionnaire together with section 142(1) notice thereon. It is not in dispute that the assessee had duly replied for the same in the assessment proceedings. Now the pertinent point would be whether the ld AO had made examination of the same or the details submitted by the assessee warrants further verification on the part of the ld AO and whether he had carried out the requisite enquiries on the said issue. In this regard, we find that the ld AO issued notices u/s 133(6) of the Act to the sundry creditors and found that in 5 cases, the same were not replied by the said parties. In 3 cases, the replies given did not match with the closing balances reflected by the assessee and this was explained by the assessee that differences arose in the opening balance. It is well settled that the difference in opening balance cannot be added in the year in which it was found out. If at all any addition is warranted on that count, then the ld AO should only refer to the relevant assessment year and make an addition in that year in the manner permissible in law. Hence the ld AO knowing this fully well had not chosen to make any addition towards the difference in closing balances of sundry creditors. Moreover, on verification of the cash book and ledgers of the assessee, the ld AO had disallowed a sum of Rs 1,44,52,154/- u/s 40A(3) of the Act for making payments exceeding Rs 20,000/- otherwise than by an account payee cheque or account payee bank draft. This has been done by the ld AO after

verifying the transactions in all the parties account as could be evident from the list furnished in the assessment order by him. Hence the entire aspect of purchases had been duly verified by the Id AO from all angles and the Id AO had taken one of the plausible views on the said issue. Admittedly, the assessee had challenged the said disallowance u/s 40A(3) of the Act before the Id CITA which is pending. We hold that the very same issue cannot be the subject matter of revision proceedings u/s 263 of the Act looking the same from different perspective . This in our considered opinion, only tantamounts to Id CIT trying to substitute his own opinion, in the opinion already framed by the Id AO, which is not permissible u/s 263 of the Act. Moreover, we find that the Id CIT had not brought on record how the order passed by the Id AO was erroneous. He had only directed the Id AO to make further enquiries by expanding its scope, to find out whether error had crept in in the earlier order. This, in our considered opinion, is not permissible in the revisionary proceedings u/s 263 of the Act by the Id CIT. Reliance in this regard is placed on the decision of the *Hon'ble Bombay High Court in the case of CIT vs Nirav Modi reported in (2016) 71 taxmann.com 272 (Bom) dated 16.6.2016* wherein it was held that :-

7. Firstly, the Revenue contends that the exercise of powers under Section 263 of the Act is justified as in this case, as no inquiry in respect of the gifts received during the subject years was done by the Assessing Officer for the Assessment orders for Assessment Years 2007-08 and 2008-09. This according to the Revenue is evident from the Assessment Orders dated 31st December, 2009 and 30th December, 2010 which does not even make a mention of the gifts received much less discuss and/or deal with the same. This issue is no longer res integra as this Court in Idea Cellular Ltd. v. Dy. CIT [2008] 301 ITR 407 (Bom) has held that if during Assessment proceedings queries were raised and the assessee responded to the same, then even if an Assessment order does not mention the same, it does not mean that the Assessing Officer has not applied his mind to the issues. It would be well-nigh impossible for an Assessing Officer to complete all assessments assigned to him under Section 143(3) of the Act if he is required to deal with all issues which arose during the Assessment Proceedings. Thus, the Assessment Order primarily deal with only those issues in respect of which the Assessee has not been able to satisfy him and give reasons for his conclusion. This would enable the Assessee to challenge the same, if aggrieved. In fact the Gujarat High Court in CIT v. Nirma Chemical Works Ltd.[2009] 309 ITR 67 (Guj) has observed that if an assessment order were to incorporate the reasons for upholding the claim made by an assessee, the result would be an epitome and not an assessment order. In this case, during the assessment proceedings for both the Assessment Years, the Assessing Officer

issued a query memos to the assessee, calling upon him to justify the genuineness of the gifts. The Respondent-Assessee responded to the same by giving evidence of the communications received from his father and his sister i.e. the donors of the gifts along with the statement of their Bank accounts. On perusal, the Assessing Officer was satisfied about the identities of the donors, the source from where these funds have come and also the creditworthiness/capacity of the donor. Once the Assessing Officer was satisfied with regard to the same, there was no further requirement on the part of the Assessing Officer to disclose his satisfaction in the Assessment Order passed thereon. Thus, this objection on the part of the Revenue, cannot be accepted.

8. It is next submitted that the donor had not been examined by the Assessing Officer. It is not in every case that every evidence produced has to be tested by cross examination of the person giving the evidence. It is only in cases where the evidence produced gives rise to suspicion about its veracity that further scrutiny is called for. If there is nothing on record to indicate that the evidence produced is not reliable and the Assessing Officer was satisfied with the same, then it is not open to the CIT to exercise his powers of Revision without the CIT recording how and why the order is erroneous due to not examining the donors. Thus, this objection to the impugned order by the Revenue is also not sustainable.

9. It was next submitted that no enquiry was done by the Assessing Officer to find out whether the donor Mr Deepak Modi (father) had received money from M/s. Chang Jiang as claimed. Nor any inquiry was done to find out whether the sister had in fact earned amounts on account of Foreign Exchange Transactions as claimed by her. We find that this enquiry of a source of source is not the requirement of law. Once the Assessing Officer is satisfied with the explanation offered on inquiry, it is not open to the CIT in exercise of his revisional powers direct that further enquiry has to be done. At the very highest, the case of the Revenue is that this is a case of inadequate inquiry and not of "no enquiry." It is well settled that the jurisdiction under Section 263 of the Act can be exercised by the CIT only when it is a case of lack of enquiry and not one of inadequate enquiry. This view has been taken by this Court in the matter of CIT v. Shreepati Holdings & Finance (P.) Ltd. [ITA 1879 of 2013 dated 5th October, 2013], by the Delhi High Court in CIT v. Vikas Polymers [2012] 341 ITR 537 and in D.G. Housing Projects (supra). In fact the Delhi High Court in D.G. Housing Projects (supra) while so holding placed reliance upon the decision of this Court in Gabriel (India) Ltd. (supra). It is very important to note that the CIT in his order under Section 263 of the Act has recorded the fact that there has been no adequate inquiry. Thus, this is not a case of no inquiry, warranting order under Section 263 of the Act. Thus, this objection on the part of the Revenue, is also not sustainable.

10. The Revenue placed reliance upon the decision of the Delhi High Court in D.G. Housing Projects Ltd., (supra) that as the Assessing Officer had not enquired into the source of the source of the gifts received by the Assessee, the Assessment Order is erroneous. The aforesaid decision holds that the power of Revision under Section 263 of the Act would normally be exercised in case of no enquiry and not in cases of inadequate enquiry. However, even in case of inadequate enquiry by the Assessing Officer, the order of the Assessing Officer could be erroneous in two classes of

situation. The first class would be where orders passed by the Assessing Officer are ex facie erroneous i.e. a decision rendered ignoring a binding decision in favour of the Revenue or where enquiry is per se mandated on the basis of the record available before the Assessing Officer and that is not done. In the second class of cases, where the order is not ex facie erroneous, then the CIT must himself conduct an enquiry and determine it to be so. The Court held that it is not permissible to the CIT while exercising power under Section 263 of the Act to remit the issue to the Assessing Officer to re-examine the same and find out whether earlier order of Assessment is erroneous. It is the CIT who must hold that the order is erroneous, duly supported by reasons. In the present facts, the CIT in exercise of its powers under Section 263 of the Act has merely restored the Assessment to the Assessing Officer to decide whether the gifts were genuine and, if not, then the Assessment could be completed on application of Section 68 of the Act. In this case, the order passed by the Assessing Officer is not per se erroneous and further the CIT has not given any reasons to conclude that the order is erroneous. In fact, he directs the Assessing Officer to find out whether the order is erroneous by making further enquiry. This the decision of the Delhi High Court in D.G. Housing Projects Ltd. (supra), clearly negates. In the above view, the decision of Delhi High Court in D.G. Housing Projects Ltd. (supra) would not assist the Revenue in the present facts.

In the instant case, the Id CIT himself concedes in his order that the Id AO had not made complete and full enquiry on the issue of purchases.

9.1. We find that the Id CIT nowhere in his order had definitely held that the expenditure over and above the sum of Rs 1,44,52,154/- falls within the purview of section 40A(3) of the Act or that the records show that the purchase claim made or their creditors are bogus. He is only raising a suspicion that there might be some more payments falling within the ambit of section 40A(3) of the Act or the related purchases / creditors could be bogus. Moreover, we find that the Id CIT had directed the Id AO to find out, basing on further enquiries to be conducted by the Id AO, whether the earlier order passed by him was erroneous or not. If he has got some doubt, then the Id CIT himself should conduct the necessary enquiries / verification and bring out the error committed by the Id AO in his order.

9.2. Even with regard to verification of purchases and its trade creditors, the details were furnished by the assessee before the Id AO who in turn , issued notices u/s 133(6) of the Act to them and the Id AO observed that there were some mismatch in closing balances with regard to certain creditors and certain parties did not respond to the said notices u/s 133(6) of the Act. It was submitted by the assessee that there were no transaction with M/s BBM Enterprise, M/s S.P.Shaw & Bros., M/s Sumo Son Exports Pvt Ltd and M/s Victoria Wines P Ltd. Hence the fact that the parties did not respond to notices issued u/s 133(6) of the Act or that their balances did not match with that of the assessee is totally irrelevant as no claim of purchases from the said parties was made in the year under appeal by the assessee. Similarly in respect of the observation that no reply was received from M/s Mohan Brother (Drinks) Pvt Ltd and M/s B Deboo & Co, it was submitted that they are old suppliers and purchases have been made from them in earlier financial years also. It was submitted by the Id AR that in the assessment for the Asst Year 2007-08, the Id AO had verified the purchases made from them who in turn had responded to notice issued u/s 133(6) of the Act . We hold that just because the said party had not responded to 133(6) notice in this year, it cannot lead to an inference that purchases from them are bogus especially when no material to this effect had been brought on record by the Id CIT. With respect to purchases from Shree Riddhi Siddhi and N.C.Shaw & Co, it was submitted that the Id CIT had not recorded a finding to the effect that the said parties does not exist or that there was a mismatch of purchases recorded by the assessee and that recorded by N.C.Shaw & Co. or that the purchases recorded by the assessee is more than that shown by the party. These factors would not result in order of Id AO becoming erroneous when due enquiries in this regard were indeed made by the Id AO in the assessment proceedings.

9.3. We find that the Id CIT in his order had observed that interest free advances of Rs 1,46,06,233/- to the partners had been financed from the sundry creditors shown in the balance sheet. It was further contended that if the creditors would have been genuine

then the assessee would have repaid the creditors instead of making advances to partners since most of the creditors represented balances brought forward from earlier years. Here the Id CIT concedes that the difference in closing balances in creditors account did not occur due to purchases made during the year under appeal and that the said difference arose only in the opening balance. Hence in any case, there cannot be any addition towards opening balance of sundry creditors in this year under appeal under any provisions of the Act. Hence there cannot be any error that could be attributed in the order of the Id AO in this regard.

9.4. As far as the discrepancy in the purchases figure, the assessee had filed a party wise reconciliation statement before the Id CIT enclosed in page 13 of the paper book which contained credit notes issued by several parties to the tune of Rs 2,31,550/- contributing to the difference in purchases. We find that the Id CIT had merely directed the Id AO to reconsider the matter without pointing out any specific error in the assessment concluded by the Id AO in this regard. Further Rs 4,68,521/- was on account of Tax Collected at Source (TCS) by the creditor not considered by the assessee in its books. However, such non-consideration of purchases has not resulted in any loss of tax to the revenue and hence the same cannot be said to be prejudicial to the interest of the revenue. Infact it had only resulted in lower claim of purchases in the return. Hence the conditions precedent by satisfying twin conditions [i.e (i) order to be erroneous and (ii) order should be prejudicial to interest of revenue] for invoking revisionary jurisdiction fails here.

9.5. In view of our aforesaid findings in the facts and circumstances of the case and respectfully following the judicial precedent relied upon hereinabove, we hold that the Id CIT erred in invoking revisionary jurisdiction u/s 263 of the Act on the ground of 'lack of enquiry' when adequate enquiries were already made by the Id AO in the assessment proceedings. Hence the action of the Id CIT in invoking revisionary

jurisdiction u/s 263 of the Act in these facts and circumstances of the case is not in accordance with law and is hereby quashed.

10. We find that the Id AO by already making the disallowance u/s 40A(3) of the Act in the sum of Rs 1,44,52,154/- had caused greater prejudice to the assessee in the assessment. Moreover, the said assessment is challenged before the Id CITA and the same is pending. While this is so, we are afraid whether the same issue could be the subject matter of revision proceedings u/s 263 of the Act by seeking to look into the very same issue from different perspective. We find that the action of the Id CIT was in complete disregard to the specific provisions of clause (c) of Explanation to section 263(1) of the Act, which places a clear embargo on the Id CIT with respect to exercise of revisionary jurisdiction on assessments which have been subject matter of appeal. Reliance in this regard is placed on the decision of the *Hon'ble Calcutta High Court in the case of Oil India Ltd vs CIT reported in 138 ITR 836 (Cal)* wherein, the Honble Court interpreting the scope of powers of the Commissioner u/s 263 of the Act held that where an appeal is preferred before the Appellate Assistant Commissioner (AAC) and a subject is particularly raised, the Commissioner cannot revise such an order taking into account an aspect not dealt by the AAC.

10.1. We find that the following decisions also would be relevant on the theory of merger :-

- a) *CIT vs Subarna Plantation and Trading Co. Ltd reported in 238 ITR 319 (Cal)*
- b) *CIT vs Vippy Solvex Products (P) Ltd reported in 228 ITR 587 (MP)*
- c) *CIT vs Sashi Theatre Pvt Ltd reported in 248 ITR 126 (Guj)*
- d) *CIT vs Ram Kishore Raj Kishore reported in 135 Taxman 511 (All)*
- e) *CIT vs K Sera Sera Productions Ltd reported in 374 ITR 503 (Bom)*
- f) *CIT vs Palghad Shadi Mahal Trust reported in 212 ITR 287 (Ker)*
- g) *CIT vs Saraff Bandhu P Ltd reported in 216 ITR 833 (Bom)*

10.2. We hold that the Id CITA having conferred with the co-terminus powers with that of the Id AO has got every right to even enhance the assessment if circumstances so warrant. Just because the Id CITA had not exercised his enhancement powers in the instant case, even if it is to be done, that would not confer automatic revisionary power u/s 263 of the Act for the Id CIT. In this regard, the reliance placed by the Id AR on the observations of the *Hon'ble Supreme Court in the case of Jute Corporation of India Ltd vs CIT and Another reported in 187 ITR 688 (SC)* is very well founded, wherein it was held that :-

5. In CIT v. Kanpur Coal Syndicate [1964] 53 ITR 225, a three-Judge Bench of this Court discussed the scope of section 31(3)(a) of the 1922 Act, which is almost identical to section 251(1)(a) of the 1961 Act. The Court held as under:

"...If an appeal lies, section 31 of the Act describes the powers of the Appellate Assistant Commissioner in such an appeal. Under section 31(3)(a) in disposing of such an appeal the Appellate Assistant Commissioner may, in the case of an order of assessment, confirm, reduce, enhance or annul the assessment; under clause (b) thereof he may set aside the assessment and direct the Income-tax Officer to make a fresh assessment. The Appellate Assistant Commissioner has, therefore, plenary powers in disposing of an appeal. The scope of his power is co-terminous with that of the Income-tax Officer. He can do what the Income-tax Officer can do and also direct him to do what he has failed to do....." [Emphasis Supplied] (p. 229)

The above observations are squarely applicable to the interpretation of section 251(1)(a). The declaration of law is clear that the power of the AAC is co-terminous with that of the ITO, if that be so, there appears to be no reason as to why the appellate authority cannot modify the assessment order on an additional ground even if not raised before the ITO. No exception could be taken to this view as the Act does not place any restriction or limitation on the exercise of appellate power. Even otherwise an appellate authority while hearing appeal against the order of a subordinate authority has all the powers which the original authority may have in deciding the question before it subject to the restrictions or limitations, if any, prescribed by the statutory provisions. In the absence of any statutory provision the appellate authority is vested with all the plenary powers which the subordinate authority may have in the matter. There appears to be no good reason and none was placed before us to justify curtailment of the power of the AAC in entertaining an additional ground raised by the assessee in seeking modification of the order of assessment passed by the ITO.

10.3. We find that the clause (c) of Explanation 1 to section 263(1) of the Act clearly prohibits the action of the Id CIT for invoking revisionary jurisdiction by the Id CIT . For the sake of convenience, the relevant provisions are reproduced below:-

Section 263 - Revision of orders prejudicial to revenue

(1)

Explanation 1 – For the removal of doubts, it is hereby declared that , for the purposes of this sub-section , -

(c) where any order referred to in this sub-section and passed by the Assessing Officer had been the subject matter of any appeal [filed on or before or after the 1st day of June 1988], the powers of the [Principal Commissioner or] Commissioner under this sub-section shall extend [and shall be deemed always to have extended] to such matters as had not been considered and decided in such appeal.

Hence the emphasis is to be given on the expression ‘matters as had not been considered and decided in such appeal’ in Clause (c) of Explanation 1 to section 263(1) of the Act. Hence even if the issues raised by the Id CIT in the revision proceedings u/s 263 of the Act are found to be correct, the same could very well be done by the Id CITA in the first appellate proceedings, if he so desires, in view of enhancement powers provided to him in the statute. It would be relevant to look into the decision of the *Hon’ble Calcutta High Court in the case of Oil India Ltd vs CIT reported in 138 ITR 836 (Cal)* in this regard, wherein it was held that :-

Upon this the three questions as mentioned hereinbefore have been referred to this court. The first question is directed to the aspect whether after the appellate order was passed by the AAC or an appeal had been preferred, the Commissioner had jurisdiction in the facts and circumstances of this case under section 263 of the Act. Now, it is well settled that before an appeal before the AAC certain orders are appealable. It is also well settled that in an appeal preferred before the AAC the whole assessment is open for review by the AAC. He is both the appellate as well as the adjudicating authority. But his jurisdiction is limited to the appeal preferred before him. There are certain orders which are not appealable before the AAC but certain types of allegations can be taken up in an appeal by separate appeals. Apart from those two cases if an assessment is the subject-matter of appeal then any ground which was held in favour of the assessee can also be held against him though the appeal was preferred by the assessee. This jurisdiction of the AAC is indisputable. In this case the question is whether the quantum of allowance or disallowance or depreciation was the subject-matter of appeal or not. It

is true that whether depreciation should be calculated on the basis of 12 months or it should be calculated on the basis of 11 months was not a specific aspect which was agitated before the AAC nor did he give any direction on this aspect of the matter but he had this aspect kept open for adjudication by him even though not taken by the assessee. Then, on that, he could have allowed 5% or 2½% depreciation and should have directed the ITO to compute the same on such basis as he considered fit and proper, namely, 11 months or 12 months on the view that the employee of the assessee was on leave for one month and as such could not be said to be entitled to this accommodation. If that is the position, then, in our opinion, once the appeal has been preferred before the AAC on any aspect of the quantum of depreciation, the Commissioner cannot assume jurisdiction, otherwise an anomalous position would arise. The ITO has been directed by the AAC to fix depreciation at a certain percentage, indicated by the AAC, without any further direction that it should be confined to 11 months or 12 months. But, now, if further consideration is superimposed by the Commissioner by rectification made by the ITO as a result of the order passed by the Commissioner under section 263 then that would be in conflict with the direction given by the AAC in his appellate order. Therefore, where an appeal is preferred and the subject-matter of appeal, particularly raised, is the subject-matter before the AAC, then that order, in our opinion, cannot be the subject-matter of an order of revision by the Commissioner. This principle, however, comes where the appeal does not lie from the order of the ITO and before the AAC where different kinds of appeal are provided for in the scheme of the Income-tax Act. This principle was enunciated by the Supreme Court in the case of CIT v. Amritlal Bhogilal & Co. [1958] 34 ITR 130 (SC). This was also reiterated in the decision in the case of Jeewanlal (1929) Ltd. v. Addl. CIT [1977] 108 ITR 407 (Cal) and the decision in the case of Premchand Sitanath Roy v. Addl. CIT [1977] 109 ITR 751 (Cal). The Allahabad High Court reiterated the same principle in the case of J.K. Synthetics Ltd. v. Addl. CIT [1976] 105 ITR 344 (All). Therefore, it appears to us that as the quantum of depreciation was the subject-matter of appeal the Commissioner had no jurisdiction, in the facts and circumstances of this case, to issue the notice under section 263 and to pass any order on this aspect of the matter. Question No. 1 therefore, in our opinion, must be answered in the negative and in favour of the assessee.

10.4. We find that similar views were expressed in the following decisions :-

- a) *Hon'ble Karnataka High Court in the case of DCIT vs Verma Industries Ltd reported in 117 Taxman 512 (Kar)*
- b) *Hon'ble Madras High Court in the case of CIT vs Farida Prime Tannery reported in 135 Taxman 70 (Mad)*
- c) *Hon'ble Supreme Court in the case of CIT vs Sri Arbuda Mills Ltd reported in 231 ITR 50 (SC).*

d) Decision of co-ordinate bench of *Delhi Tribunal in the case of Sujata Grover vs ACIT reported in 74 TTJ 347* .

10.5. Respectfully following the aforesaid decisions , we hold that an issue of disallowance of purchases u/s 40A(3) of the Act is already the subject matter of appellate proceedings before the Id CITA and hence the same cannot be the subject matter of re-verification and re-adjudication from different perspective by the Id CIT under revisionary jurisdiction u/s 263 of the Act. Hence the action of the Id CIT in invoking revisionary jurisdiction u/s 263 of the Act deserves to be quashed on this count also.

11. Hence we hold that the action of the Id CIT in invoking revisionary jurisdiction u/s 263 of the Act is not in accordance with law and is hereby quashed.

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

Order pronounced in the Court on 07.07.2017

Sd/-
[A.T.Varkey]
Judicial Member

Sd/-
[M.Balaganesh]
Accountant Member

Dated : 07.07.2017

[RG PS]

Copy of the order forwarded to:

1. M/s AB (Wines) Stores, 8/7A, Mahatma Gandhi Road, Kolkata-700009.
2. Principal C.I.T.-14, Kolkata.
- 3.. CIT(DR), Kolkata Benches, Kolkata.

True copy

By Order

Senior Private Secretary
Head of Office/D.D.O., ITAT, Kolkata Benches

