INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "A": NEW DELHI

BEFORE SHRI R. K. PANDA, ACCOUNTANT MEMBER
AND
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER

ITA Nos. 2735,2347/Del/2016
Assessment Years: 2012-13, 2011-12

Pratibha SMS Jv. C/o Jayesh Sanghrajka & Co. LLP Chartered Accountants Unit No. 405-408, Hind Rajasthan Centre, D.S. Palke Road, Dadar (E) Mumbai – 400 014 PAN AABAP2640M	Vs.	Pr. CIT 21, Civic Centre New Delhi.
(Appellant)		**(Respondent)**

Assessee by:	Shri Marghav Shukla, CA Shri Amar Sanghvi, CA
Department by :	Smt. Aparna Karan,CIT (DR)
Date of Hearing	23/08/2017
Date of pronouncement	/2017

O R D E R

PER SUDHANSHU SRIVASTAVA, J.M

Both these appeals have been preferred by the assessee. ITA No. 2735/DEL/16 challenges order dated 23.3.2016 passed by the Ld. Pr.CIT, Delhi, passed u/s 263 of the Income Tax Act, 1961 (hereinafter called "the Act") for assessment year 2012-13. ITA No. 2347/DEL/2016

challenges order dated 29.3.2016 passed by the Pr. CIT Delhi passed u/s 263 of the Act for assessment year 2011-12. As both the appeals have identical issues, they were heard together and are being disposed off through this common order.

2. Brief facts of the case for assessment year 2011-12 are that the return of income was filed declaring NIL income. Subsequently, the case was selected for scrutiny through CASS and the assessment was completed vide order dated 7.2.2014 wherein the assessee's claim of deduction u/s 80IA of the Act was accepted. Similarly, for assessment year 2012-13 the return of income was filed declaring NIL income and the case was selected for scrutiny through CASS and, thereafter, vide order dated 20.2.2015, the assessment was completed after giving the assessee benefit of deduction u/s 80IA of the Act.

2.1 Subsequently, the Ld. Pr.CIT issued show cause notices u/s 263 of the Act for both the years. It was mentioned in the show cause notices that the orders of the AO were erroneous in so far as they were prejudicial to the interest of the revenue and required to be amended as there was an error apparent from the record within the meaning of section 263 of the Act. The Ld. Pr. CIT in the show cause notices stated

that the assessee was not eligible for deduction u/s 80IA (4)(i)(b) as the assessee was working merely as a government contractor on a works contract with HUDA and no development activities were being carried out by the assessee.

2.2 In response to the show cause notices, the assessee submitted before the Ld. Pr. CIT that the assessee was a joint venture between M/s Pratibha Industries Ltd. and M/s SMS Paryavaran Ltd. and that all the conditions laid down in the statute in respect of claim of deduction u/s 80IA of the Act had been duly complied with. It was further submitted that the show cause notices did not specify the details and reasoning for holding that the assessee was not involved in development work and was merely working as a works contractor. It was further submitted that merely because HUDA had deducted tax at source u/s 194C of the Act, it did not make the assessee a works contractor as all the risks were being borne by the assessee. The assessee also relied upon certain judicial precedents to support its case but the Ld. Pr. CIT was of the opinion that deduction u/s 80IA of the Act could not be claimed by an assessee who executes works contact. The Ld. Pr. CIT also relied on certain judicial precedents and proceeded to hold that the assessment orders for both the years were erroneous and prejudicial to the interest of the revenue

as they had been passed in utmost haste and in a cryptic manner and further that the benefit of section 80IA had been allowed erroneously without considering whether the conditions thereof were fulfilled or not.

2.3 The Ld. Pr. CIT proceeded to cancel the assessment orders passed u/s 143(3) for both the years and directed the AO to make fresh assessments after examining the correct legal and factual position.

2.4 Now, the assessee has approached the ITAT and has challenged the orders passed u/s 263 of the Act, by the Ld. Pr. CIT for both the years.

3. The Ld. Authorised Representative submitted that the orders passed u/s 263 of the Act were liable to be quashed because the allegation of the Ld. Pr. CIT that the AO had passed the order in haste and without examining the assesee's claim for deduction u/s 80IA was factually incorrect. He drew our attention to the paper books filed for both the years and drew our attention to the notices issued by the AO along with the list of accounts and documents required by the AO for the purpose of assessment proceedings. He further drew our attention to the copies of detailed submissions made before the AO and also copy of detailed note specifically on the issue of claim of deduction u/s 80IA of

the Act which was submitted before the AO and was available on pages 6 to 33 of the paper book. It was submitted that the AO had made a proper inquiry and which was duly responded to by the assessee in great detail, especially, with respect to the assessee's claim of deduction u/s 80IA and, therefore, the allegation of the Ld. Pr. CIT regarding non-examination of the eligibility for the claim of deduction by the AO was incorrect. It was also submitted that as far as the eligibility of the assessee was concerned, the assessee has complied with all the requirements of section 80IA. It was submitted that the assessee is engaged in the business of designing, constructing, testing, commissioning, operating and maintenance of water works for HUDA and, thus, is engaged in developing, operating and maintaining new infrastructure facility. It was submitted that the work was done after entering into agreement with the local body, Haryana Urban Development Authority (HUDA), and the return of income was also filed before the due date of filing of return. It was further submitted that merely because the assessee had entered into an agreement with HUDA, it cannot be treated only as a works contractor as the statute specifically required the assessee to enter into agreement with the Central Government, State Government or local authorities. It was also

submitted that the assessee had procured material on its own and the resources needed for the execution of the projects were also sourced by the assessee on its own and were not provided by HUDA. It was also submitted that the mere fact that the assessee was paid by HUDA would not make the assessee ineligible as this was a project for supply of water and the assessee could not be given the right to collect payments directly from the persons/consumers and only the authority had the right to collect the payments. Reliance was placed on order of ITAT Jaipur Bench in the case of Om Metals Infraprojects Limited vs. CIT in ITA Nos. 722 and 723/JP/2008 wherein the ITAT Jaipur Bench, while relying on another order of ITAT Mumbai Bench in the case of Patel Engineering Company Ltd. vs. ACIT 94 ITD 411 (Mumbai), had held that development of water supply and irrigation project was infrastructure. The ITAT had further held that the word 'contractor' is not opposite to the word ' developer' and further that the assessee was not a mere contractor but also a developer and hence eligible to get deduction u/s 80IA.

4. In response, the Ld. CIT (DR) submitted that the Ld. Pr. CIT had passed detailed orders giving reasons for the orders of the AO being erroneous in so far as being prejudicial to the interest of the revenue. It

was also submitted that the AO had not carried out any discussion in the impugned assessment orders before allowing the assessee the benefit of deduction u/s 80IA.

5. We have heard the rival submissions and have perused the material on record. The facts of the case are undisputed. The assessee is a joint venture between M/s Pratibha Industries Ltd and M/s Paryavaran SMS. The assessee was engaged by HUDA for the work of designing, constructing, testing, commissioning, operating and maintaining for five years works comprising of inlet channels, RCC storage and sedimentation tanks, raw water sumps, raw water pump houses, automated W.T.P clear water pumping machinery , pre and post chlorination, system and all other works contingent thereto, complete in all respects on turnkey basis for HUDA at village Chandu Budhera, District Gurgaon, Haryana.

5.1 As per the sub section 4 of section 80IA of Income Tax Act, 1961 deduction is available for 10 years out of 20 years to an eligible enterprise if the infrastructure facility is of the nature of rail system, highway project, water supply project, port etc. This section further provides that it applies to any enterprise carrying on the business of

1) developing; 2) operating and maintaining; 3) developing, operating and maintaining any infrastructure facility subject to the fulfilment of the conditions that it is owned by a company registered in India or by a consortium of such companies or by authority or a board or a corporation or any other body established or constituted under any Central or State Government or it has entered into an agreement with the Central Government or the State Government or a local authority or any statutory body for developing or operating and maintaining or developing, operating and maintaining a new infrastructure facility as per explanation (d) of section 80IA. A water supply project includes water treatment system, irrigation project, sanitation and sewerage system or solid waste management system.

5.2 It is not in dispute that the AO had made inquiries about the claim of deduction made by the assessee u/s 80IA as the same is evident from the copy of notices wherein the assessee has been required to furnish complete details of deduction u/s 80IA with all the documentary evidences. We have also gone through the submissions that the assessee has submitted before the AO in this regard. In the assessment orders also, the AO has noted that he has examined the claim of the assessee with respect of deduction u/s 80IA and that further all the

relevant papers/documents regarding the claim were called for and are placed on records and, further, that after examining the claim for deduction u/s 80IA, the same is found satisfactory. The Ld. Pr. CIT, however, was of the opinion that the AO has dealt the issue in a cryptic manner and in utmost haste and has not considered whether the conditions for allowing the benefit of section 80IA (4) of the Act were fulfilled or not. It is an admitted position that CIT has been conferred with wide revisionary powers u/s 263 of the Act for calling for an examination of records so as to find out whether the order passed by the Assessing Officer is erroneous and prejudicial to the interest of the revenue. However, it is also an admitted position of law that the CIT, before reaching such conclusion, must have some material to hold a *prima facie* opinion about inherent error in the order thereby making that order prejudicial to the interest of the revenue. It is an equally settled law that if the Assessing Officer has made inquiries during the course of assessment proceedings on the issues covered u/s 263 and the assessee had already submitted explanations on those issues before the AO and further the Assessing Officer has been satisfied by the explanation of the assessee, then it cannot be said that the order passed by the Assessing Officer is erroneous. It is not material that in case of inquiries made by

the Assessing Officer, the Assessing Officer makes detailed discussion on those issues in the assessment order. On the facts of the case before us, it is evident from the records that the Assessing Officer had required the assessee to furnish details/documents in support for its claim u/s 80IA of the Act. Thus, it is evident that on the issue involved in the order of the Ld. Pr. CIT, the Assessing Officer had made some kind of inquiry to which the assessee had duly responded. Therefore, the view of the Ld. Pr. CIT that inquiry has not been made by the Assessing Officer is not correct and it is not the case of lack of inquiry as has been alleged by the Ld. CIT.

5.3 In the case of CIT vs Sunbeam Auto Ltd. reported in 332 ITR 167 (Del.), the Hon'ble Delhi High Court has held as under:-

> "*We have considered the rival submissions of the counsel on the other side and have gone through the records. The first issue that arises for our consideration is about the exercise of power by the Commissioner of Income-tax under section 263 of the Income- tax Act. As noted above, the submission of learned counsel for the Revenue was that while passing the assessment order, the Assessing Officer did not consider this aspect specifically whether the expenditure in question was revenue or capital expenditure. This argument predicates on the assessment order, which apparently does not give any reasons while allowing the entire expenditure as revenue expenditure. However, that by itself would not be indicative of the fact that the Assessing Officer had not applied his mind on the issue. There are judgments galore laying down*

the principle that the Assessing Officer in the assessment order is not required to give detailed reason in respect of each and every item of deduction, etc. Therefore, one has to see from the record as to whether there was application of mind before allowing the expenditure in question as revenue expenditure. Learned counsel for the assessee is right in his submission that one has to keev in mind the distinction between 'lack of inquiry[1] and 'inadequate inquiry'. If there was any inquiry, even inadequate that would not by itself eive occasion to the Commissioner to pass orders under section 263 of the Act, merely because he has a different opinion in the matter. It is only in cases of 'lack of inquiry' that such a course of action would be open. In Gabriel India Ltd. [1993] 203 ITR 108 (Bom), law on this aspect was discussed in the following manner (page 113):

> *'. . . 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 fulfillment 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 [1977] 106 ITR 1 (SC) at page 10)...*

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 a conclusion and such a conclusion cannot be formed to be erroneous simply because the Commissioner does not feel satisfied with the conclusion ***...*** *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**...**"*

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."

5.4 Further, the Hon'ble Delhi High Court in CIT vs Vikas Polymers, reported in 341 ITR 537 (Del.) has held that an inquiry which has been raised during the course of scrutiny by the Assessing Officer and which has been answered to the satisfaction of the Assessing Officer but neither the inquiry nor the answer was reflected in the assessment order, that would not, by itself, lead to the conclusion that the order of the Assessing Officer called for any interference and revision.

5.5 Similarly, the Bombay High Court in CIT vs Fine Jewellery (India) Ltd. reported in 372 ITR 303 (Bombay) held that if an inquiry is raised during the assessment proceedings and responded to by the assessee,

the mere fact that it has not dealt with it in the assessment order would not lead to a conclusion that no mind had been applied to it.

5.6 The Hon'ble Bombay High Court in Gabriel India Ltd. reported in 203 ITR 108 (Bom.) has held that the power of *suo moto* revision cannot be exercised by the Commissioner if, only based on the examination of records, he considers that any order passed by the Assessing Officer is erroneous in so far as it is prejudicial to the interest of the revenue. The Hon'ble High Court held that power u/s 263 is not an arbitrary or unchartered power and can be exercised only on the fulfilment of the requirement laid down in section 263(1) of the Act. The Hon'ble Bombay High Court further held that the conclusion of the Commissioner must be based on material on record and proceedings called for by him and if there are no materials on record on the basis of which it could 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 Hon'ble Bombay High Court held that the Commissioner cannot initiate proceedings with a view to start fishing and roving inquiries in matters or orders which are already concluded. As such, action will be against well accepted policy of law that there must be a point of finality in all

legal proceedings and that stale issues should not be reactivated beyond a particular stage and further that lapse of time must induce a repose in and set at rest judicial and quasi-judicial controversies, as it must, in other spheres of human activity.

5.7 From the above it is clear that in the ultimate analysis it is a pre-requisite that the Commissioner must give reasons to justify the exercise of *suo moto* revisional powers by him to re-open a concluded assessment. A bare reiteration by him that the order of the Income-tax Officer is erroneous insofar as it is prejudicial to the interest of the revenue, will not suffice. The exercise of the power being quasi-judicial in nature, the reasons must be such as to show that the enhancement or modification of the assessment or cancellation of the assessment or directions issued for a fresh assessment were called for, and must irresistibly lead to the conclusion that the order of the Income- tax Officer was not only erroneous but was prejudicial to the interest of the revenue. Thus, while the AO is not called upon to write an elaborate judgment giving detailed reasons in respect of each and every disallowance, deduction, etc., it is incumbent upon the Commissioner not to exercise his *suo moto* revisional powers unless supported by adequate reasons for doing so.

5.8 In the instant appeals before us, it is not the Department's case that no information regarding the claim of deduction u/s 80IA was called for by the AO. That relevant details and documents were furnished by the assessee during the assessment proceedings is evident from the documents on record. Hence, no inference can be drawn that the AO has not examined the issues although he has not expressed it in as many terms as may be considered appropriate by his superior authority and even if the same is found to be inadequate the same cannot be a ground for revision. The Hon'ble Madras High Court held in the case of CIT v Valliammal (D.) reported in 230 ITR 695 (Mad) that assessment order made after considering all facts and information cannot be revised. Where the assessee had furnished the requisite information and the Assessing Officer had completed the assessment after considering the facts but the commissioner revised the assessment order on the ground that the Assessing Officer had not made proper enquiries, the Tribunal was held to be justified in reversing the order of the commissioner and restoring that of the assessing officer. The Commissioner cannot re-examine accounts and substitute his judgment for that of the Assessing Officer. An order cannot be termed as erroneous unless it is not in accordance with law. If assessing officer makes assessment in

accordance with law, 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 visualize a case of substitution of the judgment of the commissioner for that of the Assessing Officer unless the decision is held to be erroneous. Cases may be visualized where the Assessing Officer examines the accounts, makes enquires, applies his mind to the facts and circumstances of the case and determines the income either by making the accounts or by making some estimates himself. The commissioner, on perusal of the records, may be of the opinion that the estimate made by the officer was on lower side and, left to the commissioner, he would have estimated the income at a higher figure that the one determined by the Assessing Officer. That would not vest the Commissioner with the power to re-examine the accounts and determine the income himself at a higher figure. Further in the case of Infosys Technologies V JCIT (Asst) reported in 286 ITR (AT) 211, the Bangalore Bench of the ITAT held that where the A.O has examined and considered and issue, though not mentioned in the assessment order, it cannot be said that the order passed was erroneous.

5.9 Therefore, on the facts of the case as well as in light of the ratio of the various judicial precedents as discussed aforesaid, we are of the considered opinion that the original assessment orders passed by the Assessing Officer u/s 143(3) of the Act, for both the years under consideration, were not erroneous and prejudicial to the interest of the revenue.

5.10 Secondly, it is seen that the Ld. Pr. CIT has placed reliance on an order of ITAT, Mumbai Bench in the case of Patil & Sons (B.T) Vs. CIT for holding that the assessee was a works contractor and that it cannot be considered as a developer. However, this order of ITAT Mumbai Bench has since been reversed by the Hon'ble Mumbai High Court. It is also seen that ITAT Mumbai Bench, in the case of Patel Engineering Company Ltd. vs. ACIT reported in 84 TTJ 646 Mumbai, has on almost similar facts and circumstances held that the assessee therein was the developer of the infrastructure project and eligible for deduction u/s 80IA. Paragraph 47 of the said order is being reproduced herein for a ready reference:-

> *"There has also been the contention of the Revenue that the assessee is a contractor, executing civil contract and so it cannot be developer as such. However, we are unable to agree with this contention of the Revenue. A person, who*

enters into a contract with another person will be a contactor no doubt; and the assessee having entered into an agreement with the Government of Maharashtra and also with APSEB for development of the infrastructure projects, is obviously a contactor but that does not derogate the assessee from being a developer as well. The term "contractor" is not essentially contradictory to the term "developer". On the other hand, rather section 80IA(4) itself provides that assessee should develop the infrastructure facility as per agreement with the Central Government, State Government or a local authority. So, entering into a lawful agreement and thereby becoming a contractor should, in no way, be a bar to the one being a developer. The assessee, presently under consideration before us, has developed infrastructure facility as per agreement with Maharashtra State Government / APSEB. Therefore, merely because, in the agreement for development of infrastructure facility, assessee is referred to as contractor or because some basic specifications are laid down, it does not detract the assessee from the position of being a developer, nor will it debar the assessee from claiming deduction under section 80IA(4). Discussed/considered as above, we hold that the assessee having carried out the work of constructing the above mentioned two projects, namely Srisailam Project and Koyana Project, as detailed above, is appropriately a developer of the said two infrastructure facilities, and in turn is entitled, and entitled justifiably, to claim deduction under section 80IA(4)."

5.11 Thus, this decision also supports the case of the assessee as in this order also the ITAT has specifically rejected the contention of the revenue that the assessee is not a developer to the Government of Maharashtra and APSEB. The facts of the case are similar to the facts of the present case and the only difference is that in the present case, the local authority is HUDA. Therefore, it is our considered opinion that the

assessment order cannot be held erroneous on this count also because the Ld. Pr.CIT had a different view on this issue. Thus, the said assessment orders are not erroneous even if they might be prejudicial to the interest of the revenue and, therefore, they cannot be made a subject matter of revision u/s 263 of the Act. Under these facts and circumstances we are of the view that the assessment orders in question on the issue were neither erroneous nor prejudicial to the interest of the revenue and, therefore, the Ld. Pr. CIT was not justified in setting aside the same. Accordingly, we deem it fit to quash the orders passed u/s 263 of the Act by the Ld. Pr. CIT and restore the assessment orders initially framed by the Assessing Officer.

6. In the final result, both the appeals filed by the assesses are allowed.

Order pronounced in the open court on 20th November, 2017.

sd/-	sd/-
(R.K.PANDA) ACCOUNTANT MEMBER	(SUDHANSHU SRIVASTAVA) JUDICIAL MEMBER

Dated: 20th November 2017

Veena

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi