IN THE INCOME TAX APPELLATE TRIBUNAL

DELHI BENCH "C", NEW DELHI

BEFORE SHRI H.S. SIDHU, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

	I.T.A. NO. 2697/DEL/2007 & I.T.A. NO. 231/DEL/2012	
	A.Y. : 2002-03	
M/S GE CAPITAL SERVICES INDIA, AIFACS BUILDING, 1, RAFI MARG, NEW DELHI – 110001 (PAN: AAACG0239L)	VS.	ADDITIONAL COMMISSIONER OF INCOME TAX, RANGE-12, NEW DELHI
(APPELLANT)		**(RESPONDENT)**

Assessee by	:	Sh. Sachit Jolly, Adv.
Department by	:	Sh. Sanjit Singh, CIT(DR)

ORDER

PER H.S. SIDHU : JM

These are two appeals filed by the Assessee, which are taken up for hearing together. The first appeal challenges the order dated 22 March, 2007 passed by the Ld. Commissioner of Income Tax, Delhi-IV under Section 263 of the Income-tax Act, 1961 (hereinafter referred the Act) for the Assessment Year 2002-03, directing reexamination of

two issues by the Assessing Officer. The second appeal challenges the order dated 28 October, 2011 passed by the Ld. Commissioner of Income-tax (Appeals)-VIII, New Delhi in the appeal filed by the Assessee challenging the Order dated 18 December, 2007 passed by the AO in the proceedings pursuant to the Order dated 22 March, 2007 passed by the CIT-IV, New Delhi u/s. 263 of the Act. For the sake of convenience, we first deal with ITA No. 2697/Del/2007.

2. The grounds raised in ITA No. 2697/DEL/2007 read as under:-

> 1. That on the facts and in the circumstances of the case and in law, the impugned order under section 263 of the Act is beyond jurisdiction, bad in law and void ab-initio.
>
> 2. That on the facts and in the circumstances of the case and in law, the Ld. CIT erred in alleging that the assessment order u/s. 143(3) of the Act was erroneous in allowing deduction of Rs. 11.15 crore debited to Profit and Loss account towards

‘Provision and write off for non-performing assets.’.

2.1 That on the facts and in the circumstances of the case the Ld. CIT erred in not appreciating that the amount of provisions of non-performing assets had already been duly added back in the computation of income and thus there was no claim which had been allowed to the assessee in contravention of section 37 of the Act.

3. That on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in alleging that the assessment order u/s. 143(3) of the Act was erroneous in allowing deduction of Rs. 1.14 crores debited to profit and loss account towards “Loss on interest rate swaps”.

4. That on the facts and in the circumstances of the case and in law, the Ld. CIT erred in setting aside the assessment order in so

far as it relate to claim of 'Provision and write off for non-performing assets' and 'Loss on interest rate swaps' for fresh adjudication.

The grounds of appeal herein above are independent and without prejudice to each other.

The appellant craves leave to alter, amend and / or withdraw all or any of the grounds of appeal herein or add any further grounds as may be considered necessary and to submit such statements, documents and papers as may be considered necessary either before or during the appeal hearing.

3. The grounds raised in ITA NO. 231/DEL/2012 read as under:-

1. That the order dated October 28, 2011 passed by the Ld. CIT(A) is

erroneous and bad in law to the extent the same confirms the addition / disallowance / levy of interest made in the assessment year.

2. That on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in confirming the disallowance of Rs. 2,28,35,593/- being the loss incurred by the appellant on account of cross currency swap arrangement by holding the same as capital loss.

2.1 That the Ld. CIT(A) erred on facts and in law in not appreciating that the cross currency swap arrangement was entered into in respect of loans taken for the purposes of working capital

requirements and hence is revenue in nature.

The grounds of appeal hereinabove are independent and without prejudice to each other.

The appellant craves leave to alter, amend any / or withdraw all or any of the grounds of appeal herein or add any further grounds as may be considered necessary and to submit such statements, documents and papers as may be considered necessary either before or during the appeal hearing.

4. The brief facts of the case are that return of income was filed by the assessee company on 31.10.2002 declaring total income of Rs. 65,41,08,720/. The original assessment was completed u/s. 143(3) of the Act on 30.3.2005 and the total income was determined at Rs. 87,01,68,210/-. Subsequently, the Ld. CIT-IV, Delhi called for and examined the

assessment records of the assessee company for the assessment year in dispute and found that the assessee company had claimed loss of Rs.2,28,35,593/- incurred on account of "cross currency swap" which was not allowable expenditure. Accordingly, having afforded due opportunity to the assessee company, the CIT-IV, Delhi vide his Order dated 22 March, 2007 passed under Section 263 of the Act, held that the original assessment order dated 30 March, 2005 under Section 143(3) of the Act for the Assessment Year 2002-03 to be erroneous and prejudicial to the interest of the Revenue because:

(a) Deduction of RS.1114.68 lacs was wrongly allowed in respect of provisions for non-performing assets, even though it was a mere contingent liability;

(b) Deduction of Rs.114.06 lacs towards loss of interest rate swap was incorrectly allowed.

In the Impugned Order, the Ld. Commissioner of Income Tax-IV, Delhi held that the AO had not

examined the aforesaid two issues properly and, therefore, set aside the issues for further inquiries to be conducted by the AO.

5. Against the aforesaid order of the Ld. CIT-IV, New Delhi passed u/s. 263 of the Act dated 22.3.2007, assessee is in appeal before the Tribunal.

6. Ld. Counsel of the assessee has stated Ld. CIT-IV, New Delhi has passed the impugned order under section 263 of the Act which is beyond jurisdiction, bad in law and void-ab-initio. He further stated that in the impugned order, the Ld. CIT held that the original assessment order dated 30.3.2005 under section 143(3) of the Act for the assessment year 2002-03 to be erroneous and prejudicial to the interest of revenue because (a) deduction of Rs. 1114.68 lacs was wrongly allowed in respect of provisions for non-performing assets, even though it was a mere contingent liability; (b) Deduction of Rs. 114.06 lacs towards loss of interest rate swap was incorrectly allowed. He further stated that in the

impugned order, the Ld. CIT further held that the AO had not examined the aforesaid two issues properly and, therefore, set aside the issues for further inquiries to be conducted by the AO. He however, submitted that both these issues were duly examined by the AO vide Questionnaire dated 2.3.2004 to which replies dated 9.12.2004, 20.12.2004 and 6.1.2005 were furnished and, therefore, the finding of the Ld. CIT that the issues was not examined properly was factually incorrect. He further stated that since the Ld. CIT has failed to point out the definite and specific error in the original assessment order, it was submitted that the Ld. CIT erred in passing the order dated 22.3.2017 on the ground that the inquiry made by the AO was inadequate or improper without first pointing out the error in the original assessment order passed by the AO, particularly because both the aforesaid issues were duly examined at the stage of the original assessment proceedings, hence, the impugned order is beyond jurisdiction, bad in law and void-ab-initio. He further stated that even otherwise

there was no actual loss to the Revenue from the deduction claimed by the assessee since on one issue the assessee has suo moto added back the amount whereas deduction in respect of loss on interest swap is an actual loss which is allowable. In view of above, he requested that the impugned order may be cancelled and appeal of the assessee be allowed. As regards other appeal being ITA No. 231/Del/2012 is concerned, he stated that it is consequential in nature. To support his contention, he relied upon the following case laws:-

- Hon'ble Jurisdictional High Court decision in the case of CIT vs. Sunbeam Auto (2011) 332 ITR 167; ITO vs. DG Housing Projects Ltd. (2012) 343 ITR 329 and the decision of the Coordinate Bench of the Tribunal in the case of its group company in GE Financial Services Ltd. in ITA No. 1941 of

2008 and 2123 of 2009.

7. On the other hand, Ld. CIT(DR) controverted the various submissions and arguments advanced by the Ld. AR of the Assessee. He has strongly relied upon the impugned Order passed u/s. 263 of the Act by the Ld. CIT and has invited our attention to the finding recorded by the learned CIT in his impugned order. Accordingly, he stated that the order passed by the AO is erroneous as well as prejudicial to the interest of the Revenue. Accordingly, he requested that the impugned order passed u/s. 263 of the Act passed by the Ld. CIT may be upheld and appeal of the assessee may be dismissed.

8. We have carefully considered the rival submissions and perused the relevant records available with us, especially the impugned order passed by the Ld. CIT u/s. 263 of the Act alongwith the legal position on the relevant issue which emanates from the various decisions cited before us; Questionnaire issued by the AO and the assessee's relies thereof attached with the Paper Book-I at

pages 1 to 98. We note that assessee has filed its return on 31.10.2002 declaring total income of Rs. 65,41,08,720/. The original assessment was completed u/s. 143(3) of the Act on 30.3.2005 and the total income was determined at Rs. 87,01,68,210/-. Subsequently, the Ld. CIT-IV, Delhi called for and examined the assessment records of the assessee company for the assessment year in dispute and found that the assessment made vide order dated 30.3.2005 us. 143(3) of the Act, the following mistakes have been committed:-

i) The deduction of Rs. 1114.68 lakhs on account of provision for non-performing assets as claimed in the return was allowed even though it was merely a contingent liability. The mistake resulted into underassessment of income to the extent of Rs. 1114.68 lakhs.

ii) The deduction of Rs. 114.06 lakhs towards loss on interest rate

swaps as debited in the profit and loss account was allowed which is not correct. The mistake resulted into underassessment of income to the extent of Rs. 114.06 lakhs.

8.1 In view of above, Ld. CIT-IV observed that assessment order dated 30.3.2005 us. 143(3) of the Act was, prima facie, considered erroneous and prejudicial to the interest of revenue. Accordingly, the notices u/s. 263 of the Act were issued on 27.7.2006, 23.1.2007 and 08.3.2007. In response to these notices, the AR of the assessee appeared before the Ld. CIT-IV and explained the facts of the case and written submissions filed vide letter dated 22.3.2007 have been taken on record. Accordingly, having afforded due opportunity to the assessee company, the Ld. CIT-IV, Delhi vide his Order dated 22 March, 2007 passed under Section 263 of the Act, held that the original assessment order dated 30 March, 2005 under Section 143(3) of the Act for the Assessment

Year 2002-03 to be erroneous and prejudicial to the interest of the Revenue because:

(a) Deduction of RS.1114.68 lacs was wrongly allowed in respect of provisions for non-performing assets, even though it was a mere contingent liability;

(b) Deduction of Rs.114.06 lacs towards loss of interest rate swap was incorrectly allowed.

8.2 In the Impugned Order, the Ld. Commissioner of Income Tax-IV, Delhi held that the AO had not examined the aforesaid two issues properly and, therefore, set aside the issues for further inquiries to be conducted by the AO. As regards the first issue is concerned, we note that out of total provision of Rs. 1114.68 lacs, a sum of Rs. 7,60,76,105/- was suo moto added back in the computation of income and a further sum of Rs. 73,46,160- was disallowed by the AO in the original assessment order dated 30.3.2005. Therefore, out of Rs. 1114.68 lacs, Rs. 834.22 lacs already stood disallowed in the original assessment order. The balance

amount represented actual write off which was palpably clear from page 2 of the impugned order itself. No deduction on account of any such provision was, therefore, allowed to the assessee. Hence, there is no error or prejudice to the interest of revenue. As regards second issue it was noted that interest rate swap was an actual loss and only the net loss of Rs. 114.05 lacs after setting of gain of interest rate swap was claimed as deduction. However, we find that both these issues were duly examined by the AO vide Questionnaire dated 2.11.2004 (Page 1-2 of the Paper Book) to which replies dated 9.12.2004, 20.12.2004 and 6.1.2005 (Page No. 3-39 of Paper Book-I) were furnished and, therefore, the finding of the Ld. CIT that the issues were not examined properly was not correct. Even the Ld. CIT has not pointed out the definite and specific error in the original assessment order and observed that the inquiry made by the AO was inadequate or improper without first pointing out the error in the original assessment order passed by the AO, particularly because both the aforesaid issues

were duly examined at the stage of the original assessment proceedings, hence, the impugned order is beyond jurisdiction, bad in law and void-ab-initio. We further note that there was no actual loss to the Revenue from the deduction claimed by the assessee since on one issue the assessee has suo moto added back the amount whereas deduction in respect of loss on interest swap is an actual loss which is allowable.

8.3 To support our aforesaid view, we draw support from the decision of the Hon'ble Jurisdictional High Court in the case of CIT vs. Sunbeam Auto (2011) 332 ITR 167 (Supra) wherein, it has been held that there is a difference between lack of inquiry and inadequate inquiry and also held that in the case of inadequate inquiry, which is the case of the Revenue in the present case, no action under section 263 of the Act can be taken unless the Commissioner records a specific and definite finding regarding the error in the assessment order, which has not done in the present case. We further draw support from the

decision of the ITAT 'C' Bench dated 30.10.2015 in the group case of the assessee i.e. GE Money Financial Services Ltd. (Formerly known as GE Countrywide Consumer Financial Services Ltd.) vs. DCIT, Circle 12(1), New Delhi passed in ITA No. 1941/Del/2008 (AY 2003-04) & 2123/De/2009 (AY 2004-05) wherein, the Tribunal has held as under:-

> *"8. We now consider the specific arguments on the jurisdiction of the Ld.CIT to invoke the powers u/s 263 of the Act.*
>
> *8.1. For the A.Y. 2003-04 and 2004-05, the A.O. has, during the course of assessment proceedings raised specific queries on these issues on allowability of business loss in both these issues from the assessee and thereafter accepted its claim.*
>
> *8.2. For the A.Y. 2004-05 the A.O. vide order sheet entry dt. 17th August, 2006 had raised a specific query in respect of allowability of*

loss on sale of repossessed assets amounting to Rs.11,14,37,000/-. The assessee vide reply dt. 4th October,2006, made detailed factual and legal submissions on the allowability of the claim. A copy of these are furnished as part of the paper book. We have perused the same.

8.3. After considering these submissions of the assessee in response to the query which included, party wise details of loss incurred on sale of repossessed assets, the A.O. accepted the claim of the assessee. Similarly for the A.Y. 2003-04 a query was raised by the A.O. and after considering the details furnished and the submissions, the claim was accepted. The question before us is, whether under such circumstances the Ld.CIT can invoke his powers u/s 263 of the Act when this is not a case of lack of enquiry but merely a case of inadequate enquiry as per the Ld.CIT.

8.4. The Hon'ble Delhi High Court in the case of CIT vs. Sunbeam Auto Ltd. (supra) has held as follows.

Held, dismissing the appeal, :

(i) That the AO allowed the claim on being satisfied with the explanation of the assessee. Such decision of the A.O. could not be held to be erroneous simply because in his order he did not make an elaborate discussion in that regard. The AO had called for explanation on the very item from the assessee and the assessee had furnished its explanation. This fact was conceded by the Commissioner himself in his order. This showed that the AO had undertaken the exercise of examining as to whether the expenditure incurred by the assessee, in the replacement of dies and tools was to be treated as revenue expenditure or not. Therefore, it could not be said that it was a case of lack of inquiry. The accounting practice followed for a

number of years had the approval of the income tax authorities. Even for future AYs the very same accounting practice was accepted. (ii) That the dies were components of the machines. They needed constant replacement, as their life was not more than a year. The assessee also explained that since the parts were manufactured for the automobile industry, which had to work on complete accuracy at high speed for a longer period, replacement of the arts at short intervals becomes imperative to retain the accuracy. With the replacement of tools and dies no new asset comes into existence nor was their benefit of enduring nature. They did not even enhance the life of the existing machine of which the tools and dies were only parts. Therefore, the view taken by the AO was one of the possible views and the assessment order passed by him could not be held to be prejudicial to the interests of Revenue. The

opinion of the AO in treating the expenditure as revenue expenditure was plausible and thus there was no material before the Ld.CIT to vary that opinion and ask for fresh enquiry.

8.5. The Hon'ble High Court in the case of CIT vs. Anil Kumar Sharma reported in 335 ITR 83 (Del) has held as follows.

" Held, dismissing the appeal, that the present case would not be one of 'lack of inquiry' even if the inquiry was termed inadequate. The Tribunal found that complete details were filed before the AO and that he applied his mind to the relevant material and facts, although such application of mind was not discernible from the assessment order. The Tribunal held that the Ld.CIT in proceedings u/s 263 also had all these details and material available before him, but had not been able to point out defects conclusively in the material, for

arriving at a conclusion that particular income had escaped assessment on account of non application of mind by the AO. The Tribunal was right and the order of revision was not valid."

8.6. The Hon'ble Delhi High Court in the case of CIT vs. Vikas Polymers reported in 341 ITR 537 (Del) has held as follows.

"Held, that the Commissioner had mentioned that the A.O. had not examined the cash credits of the partners or deposits of chit fund. Assuming this to be so, this might make the order erroneous, but how it was prejudicial to the interest of the Revenue had not been stated by the Ld.CIT as he did not deal with the explanation given by the assessee in the course of S.263 proceedings. The Commissioner observed in his order that the assessee had not filed certain documents on the record at the time of assessment. Assuming this was

so it did not justify the conclusion arrived at by the Commissioner that the AO had shirked his responsibility of examining and investigation of the case. More so, in view of the fact that the assessee explained that the capital investment made by the partners, which had been called into question by the Commissioner, and this was duly reflected in the respective assessments of the partners who were income tax assesses and the unsecured loan taken from the chit fund was duly reflected in the assessment order of the chit fund which was also an assessee. The order of revision was not valid."

8.7. Applying the propositions laid down in the above judgements, we hold that this is not the case of lack of enquiry. The Ld.CIT cannot invoke his powers u/s 263 of the Act on the ground that, in his opinion it is a case of of inadequate enquiry.

8.8. On this sole ground itself these orders passed u/s 263 of the Act for both the A.Ys have to be quashed.

8.9. Furthermore, in our opinion, the Ld.CIT has not demonstrated as to what is the prejudice caused to the Revenue in the above cases. The loss in question is admittedly a business loss, and as the Ld.CIT in his order u/s 263 of the Act for the A.Y. 2002-03 has accepted this position. As submitted by the Ld. Sr. Counsel for the assessee, if these N.P.As are written off as bad debts then 100% of such write off would have to be allowed and that the assessee was conservative in its claim.

9. Applying the propositions laid down in the above judgements to the facts of the case we hold that the invoking of powers u/s 263 of the Act for both the A.Ys is bad in law on the issue of (a) loss on sale of repossessed assets; (b) loss on sale of bad loan portfolio.

10. Coming to the issue that arises, only in the A.Y. 2004-05 i.e. depreciation on improvements to leasehold assets, we find that the Ld.CIT has gone on a wrong presumption that the depreciation is claimed for renovation of building. When the clarification has been given by the assessee that it is only depreciation of furniture and fixtures he remanded the issue to the file of A.O. for verification, without pointing out as to what is the prejudice caused to revenue. This in our opinion is bad in law.

10.1. The Hon'ble Delhi High Court in the case of CIT vs. Kelvinator of India Ltd. (2002) reported in 256 ITR p.1.(Del)(FB), held as follows: "it is well known that a presumption can also be raised to the effect that in terms of clause (e) on S.114 of the Indian Evidence Act, judicial and official Acts have

been regularly profound. If it be held that the order which has been

passed purportedly without application of mind would itself confer jurisdiction upon the A.O. who reopen the proceedings without anything further, the same would amount to be a prejudicial authority exercising quasi judicial function to take the benefit of its own wrong."

10.2. In this case, the Ld.CIT has not referred to any material from which it could be said that the acceptance of the assessee's submissions and details by the A.O. was not warranted, either in law or on facts. The Ld.CIT has not given any material or evidence which would contradict the assessee's version and which aspect has not been adverted to by the A.O. while completing the assessment. For all these reasons we allow both these appeals by the assessee for the A.Y. 2003-04 and A.Y. 2004-05, by holding that the Ld.CIT has erroneously invoked his powers u/s 263 of the Act.

10.2. Coming to the A.Y. 2002-03, admittedly there is lack of enquiry on the part of the A.O. In the S.263 proceedings, the Ld.CIT has come to a definite conclusion that the loss in question is a business loss. This does not mean that the lack of enquiry by the A.O. would not be considered as erroneous and prejudicial assessment order passed by the A.O. The A.O. has not verified either (a) the allowability of the loss in principle or (b) where the claim is factually correct as quantification of the loss has not been verified by the A.O. In our opinion such exercise of powers u/s 263 of the Act is in accordance with law. Just because the Ld.CIT has come to a conclusion that in principle the loss in question is a business loss, it does not lead to a conclusion that the quantification has to be accepted based on audited accounts, though the A.O. has not made any enquiry on this issue. It is well settled that in case of no

enquiry, it would be a case of non application of mind, resulting in an error in the assessment order which causes prejudice to the interest of the Revenue. The Ld.CIT has held the first issue in favour of the assessee and on the second issue, set aside the order for fresh adjudication.

10.3. For this year the decision of the Hon'ble Delhi High Court in the case of Duggal & Co. Reported in (supra) is squarely applicable. The Hon'ble Delhi High Court in the case of Duggal & Co. (supra) held as follows.

"Held, the Commissioner is perfectly competent to exercise his powers u/s 263 whenever he has found, prima facie, that there is need to enquire, if the interest of the revenue has suffered by an order of assessment. In the instant case, he had given certain reasons. The basis for the order of the Commissioner was a question of fact and whether it

was correct or not would have to be found out after enquiry by the AO. The Commissioner had found that the AO had omitted to enquire into this question found by the Commissioner implicit in the manner in which the amounts were borrowed and advanced by the assessee company. It was incumbent on the AO to further investigate the facts stated in the return, when circumstances would make such an inquiry prudent and the work 'erroneous' in s.263 included the failure to make such an enquiry. The order became erroneous because such an enquiry had not been made and not because there was anything wrong with the order if all the facts stated therein were assumed to be correct.

Thus, the Tribunal was justified in upholding the action of the Commissioner in invoking the provisions of s.263 of the Act and sustaining his order."

10.4. Coming to the third ground of revision i.e. excess provision of securitised assets, the Ld.CIT could have verified whether the assessee had suo moto disallowed the provision and the revision on this count would result in a double disallowance. Without coming to a firm conclusion on this issue, despite the submissions and evidences submitted by the assessee, it is wrong on the part of the Ld.CIT to simply set aside the matter to the file of the A.O. for fresh adjudication.

10.5. In any event as we have upheld the order passed u/s 263 of the Act on the first two issues, we dismiss the appeal filed by the assessee for the A.Y. 2002-03.

11. In the result the appeal of the assessee is dismissed for the A.Y. 2002- 03 and allowed for the A.Y. 2003-04 and 2004-05."

9. In the background of the aforesaid discussions and respectfully following the precedents, as referred

above, we hold that the impugned order passed by the learned CIT u/s.263 of the I.T. Act is not sustainable in the eyes of law. Accordingly, the impugned order is hereby cancelled and appeal of the Assessee is allowed.

10. As regards another ITA No. 231/Del/2012 (AY 2002-03) is concerned, since we have already cancelled the impugned order passed u/s. 263 of the Act and allowed the appeal, as aforesaid, the Appeal No. 231Del/2012 being consequential in nature has become infructuous and dismissed as such.

10. In the result, the Appeal No. 2697/Del/2007 (AY 2002-03) stand allowed and ITA No. 231/Del/2012 (AY 2002-03) stand dismissed in the aforesaid manner.

Order pronounced on 23/04/2018.

Sd/-	**Sd/-**
(PRASHANT MAHARISHI) **ACCOUNTANT MEMBER**	**(H.S. SIDHU)** **JUDICIAL MEMBER**

Dated:23/04/2018

SR BHATNAGAR

Copy forwarded to: -

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT

TRUE COPY

By Order,

ASSISTANT REGISTRAR