IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'G' NEW DELHI

BEFORE
SHRI G.D.AGRAWAL, HON'BLE PRESIDENT
AND
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER

ITA No.3225/Del/2013
Assessment Year: 2008-09

Sanspareils Greenlands Pvt. Ltd. 28/32, Victoria Park Meerut PAN : AACCS2788N	**Vs.**	CIT, Meerut

ITA No.695/Del/2016
Assessment Year: 2008-09

Sanspareils Greenlands Pvt. Ltd. C/o. J.M. Chadha & Chadha, CAs, 299, P.L. Sharma Road Meerut PAN : AACCS2788N	**Vs.**	ACIT, Circle-2, Aayakar Bhawan Meerut
Appellant		Respondent

Revenue by : Shri S.S.Rana, CIT, DR
Assessee by : Shri Rohit Jain, adv., Sh. Deepesh Jain, CA

Date of hearing : 18.07.2018
Date of pronouncement : 11.10.2018

O R D E R

PER BENCH :

ITA No. 3225/Del/2013 is the appeal preferred by the assessee against order dated 21.03.2013 passed u/s 263 of the

Income Tax Act, 1961 (hereinafter referred to as the 'Act') by the Ld. Commissioner of Income Tax, Meerut for assessment year 2008-09. ITA No. 695/Del/2016 is the assessee's appeal against order dated 11.01.2016 passed by the Ld. CIT (Appeals), Meerut for assessment year 2008-09 wherein the assessee's appeal challenging the additions made in the assessment u/s 143(3) of the Act consequent to the order passed u/s 263 of the Act was partly allowed. Both the appeals were heard together and are being disposed of by this common order for the sake of convenience.

2.0 The brief facts of the case are that the assessee company is engaged in the manufacture, purchase, sale and export of sports goods. The original assessment was completed u/s 143(3) of the Act at an income of Rs. 3,47,02,620/- vide order dated 09.11.2010. Subsequently the Ld. CIT, Meerut issued a show cause notice u/s 263 of the Act on the ground that the assessee had paid an amount of Rs. 25,87,500/- to cricket players during the year which was not of any value to the business of the assessee and further the AO had failed to make an inquiry in this regard. The Ld. CIT partly set aside the assessment order with the direction to consider the admissibility and reasonableness of

these expenses. The assessee is in appeal against this order of the Ld. CIT in ITA No. 3225/Del/2013 and has raised the following grounds of appeal :-

> "1.*That the learned Commissioner of Income Tax erred in law and on facts in invoking the provisions of Section 263 of the Income Tax Act, 1961 and passing the order dated 21.03.2013. The order passed and the various directions given are bad in law, arbitrary, erroneous and uncalled for in view of the facts and circumstances of the case and the material on record. The order therefore, deserves to be quashed.*
>
> *2. That in view of the written replies dated 11th January, 2013 and 7th February, 2013 to the notice U/s 263 with all the enclosures filed and the oral arguments advanced before her during the hearings, the learned Commissioner of Income Tax erred in law and on facts in still holding that the order passed by the Assessing Officer was erroneous and prejudicial to the interest of revenue without contradicting the various claims, through any cogent material or on any proper basis. The order U/s 263 therefore, deserves to be quashed.*
>
> *3. That without prejudice to the above, the learned Commissioner of Income Tax erred in law and on facts in holding that the expenditure of*

Rs.25,87,500/- on payments made to cricket players, booked by the appellant under the head 'Advertisement and Publicity' was deferred capital expenditure and therefore, restricting the claim to 1/5 of Rs.25,87,500/- i.e. Rs.5.17,500/- to be allowable, and remaining amount of Rs.20,70,000/- to be added to the income of the assessee.

The learned CIT was obviously confused while drawing the above conclusion, because in the end of the same para 3(i) of the order she has held that the expenditure should have been treated as deferred revenue expenditure. The entire expenditure claimed being allowable, restriction of the claim to 1/5 of Rs.25,87,500/- i.e. Rs.5,17,500/- and disallowance of Rs.20.70,000/- by her on vague grounds, without any basis, is bad-in-law, arbitrary, and uncalled for in view of the facts and circumstances of the case and the material on record.

4. That without prejudice to grounds No. 1 and 2 above, in view of the facts and circumstances of the Case and the material on record the learned Commissioner of Income Tax erred in partly setting aside the assessment order with regard to the claim of expenses under the heads Labour and Gardening. The directions given on the basis of erroneous conclusions are bad-in-law, arbitrary and uncalled for."

2.1 Further, consequent to the order passed u/s 263 of the Act, the AO pass the assessment order on 14.02.2014 by completing the assessment at Rs. 3,93,71,700/-. After making a disallowance of Rs. 20,70,000/-out of the amount paid to cricketers by treating 4/5th of the same as deferred revenue expenditure, a further disallowance of labour and wages charges amounting to Rs. 25,00,547/- and another disallowance out of gardening expenses amounting to Rs. 98,531/-. The assessee preferred an appeal before Ld. CIT (A) who partly allowed assessee's appeal by directing deletion of addition of Rs. 25,00,547/-. However, the Ld. CIT (A) upheld the other two additions. Against this adjudication by the Ld. CIT(A), the assessee is in appeal before the ITAT in ITA No. 695/Del/2016 and has raised the following grounds of appeal :-

> *"1. That on the facts and circumstances of the case, the learned Commissioner of Income Tax (Appeals) is not justified in holding that the expenditure of Rs. 25,87,500/- on payments made to cricket players, booked by the appellant under the head 'Advertisement and Publicity' was deferred capital expenditure and therefore, restricting the claim to 1/5 of Rs. 25,87,500/- i.e. Rs. 5,17,500/- to be allowable, and remaining amount of Rs.*

20,70,000/- to be added to the income of the assessee.

2. That on the facts and circumstances of the case, the learned Commissioner of Incom Tax (Appeals) is further not justified in sustaining the addition of Rs. 98,531/- on account of 10% of expenses claimed under the head "Conservancy & Gardening Expenses".

3.0 With respect to the assessee's appeal against the 263 order, the Ld. Authorised Representative submitted that the allegation of the Ld. CIT that the AO had not carried out any inquiry in respect of payments made to sports persons was incorrect because the AO had made inquiry about the same and the assessee had duly responded to the queries raised by the Assessing Officer in this regard. Our attention was drawn to pages 228 to 231 of the paper book wherein copy of the reply to the query raised by the Assessing Officer with reference to the payments made to the cricket players was placed. It was also submitted that tax had duly been deducted at source on the payments made to the six cricket players viz. Sh. Sunil Gavaskar, Sh. Suresh Raina, Sh. Wasim Jaffer, Sh. Cheteswar Pujara, Sh. Dinesh Karthick and Sh. Kiran More. It was further submitted

that the genuineness of the payments made were not doubted by the Ld. CIT also and it was only a case of difference of opinion inasmuch as the Ld. CIT felt that the payments made to the various cricketers was to be treated as deferred revenue expenditure whereas the AO had allowed the same as revenue expenditure. It was also submitted that similar expenses were being allowed without any adverse inference until the immediately preceding year. The Ld. Authorised Representative also placed on record copy of the ITAT order in assessee's own case for A.Y. 1996-97 in ITA No. 2246/Del/2000 wherein an addition of Rs. 4,00,000/- made by the AO on similar expenses was made and the Tribunal had deleted this addition by noting that this expenditure had been allowed in other years also. The Ld. Authorised Representative submitted that it was not the case of the Ld. CIT that AO had not made any inquiry on the issues which were raised by the Ld. CIT in the show cause notice. The Ld. Authorised Representative placed reliance on numerous judicial precedents and vehemently argued that the proceeding u/s 263 of the Act had been wrongly initiated.

3.1 On the merits of the additions sustained by the Ld. CIT (A), the Ld. Authorised Representative vehemently argued that

the Ld. CIT (A) had brushed aside the voluminous documents submitted by the assessee in support of the claim of the expenditure and had sustained the disallowance without appreciating the fact that the concept of deferred revenue expenditure was alien to the provisions of the Income Tax Act. With respect to the sustenance of disallowance on account of gardening expenses, it was submitted that this was an *ad hoc* disallowance and the same could not be sustained in absence of specific finding pointing out specific defect/s in the books of accounts. The Ld. Authorised Representative prayed that both the appeals of the assessee deserved to be allowed.

4.0 In response, the Ld. CIT-DR submitted that the payments to cricket players were made on account of fee for displaying of the assessee's company's logo which helped in improving the brand value of the company and, therefore, the AO had erred in allowing the entire expenditure rather than allowing 1/5th of the expenditure. The Ld. CIT-DR submitted that the Ld. CIT had rightly initiated the proceedings u/s 263 of the Act as the AO had not carried out proper inquiry in this regard. The Ld. CIT-DR also placed reliance on number of judicial precedents to support his

contention that the assumption of jurisdiction u/s 263 of the Act by the Ld. CIT was valid.

4.1 With respect to assessee's appeal challenging the quantum addition made subsequent to the order passed u/s 263 of the Act, reliance was placed on the order of the Ld. CIT (A) as well as that of the AO.

5.0 We have heard the rival submissions and have also perused the material on record. The provisions of section 263 read as under:

> *"263. (1) The Commissioner may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by the Assessing Officer is erroneous in so far as it is prejudicial to the interest of the revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment."*

5.1 It will also be expedient to reiterate the governing principles laid down by the Hon'ble Courts with regard to the exercise of power by the Commissioner under the provisions of Section 263 of the Act. The power of *suo moto* revision exercisable by the

Commissioner is undoubtedly supervisory in nature. The opening words of Section 263 empower the Commissioner to call for and examine the record of any proceedings under the Act. A bare reading of Section 263 also makes it clear that the Commissioner has to be satisfied of twin conditions, namely, (i) the order of the assessing officer sought to be revised is erroneous; and (ii) it is prejudicial to the interest of the revenue. If one of them is absent - if the order of the Assessing Officer is erroneous but is not prejudicial to the revenue or if it is not erroneous but it is prejudicial to the revenue - recourse cannot be had to Section 263(1) of the Act [See Malabar Industrial Co. Ltd. vs. CIT, (2000) 243 ITR 83 (SC)].

5.2 As regards the scope and ambit of the expression "erroneous", a Division Bench of the Hon'ble Bombay High Court in CIT vs. Gabriel India Ltd., (1993) 203 ITR 108 (Bombay), held with reference to Black's Law Dictionary that an "erroneous judgment" means "one rendered according to course and practice of Court, but contrary to law, upon mistaken view of law; or upon erroneous application of legal principles" and thus it is clear that an order cannot be terms as "erroneous" unless it is not in accordance with law. If Assessing 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 differently or more elaborately. The Section does not visualize the substitution of the judgment of the Commissioner for that of the Assessing Officer, who passed the order unless the decision is not in accordance with law. Then again, any and every erroneous order cannot be the subject matter of revision because the second requirement also must be fulfilled. There must be material on record to show that tax which was lawfully exigible has not been imposed [See Gabriel India Ltd. (supra)]. However, the expression "prejudicial to the interest of the revenue", as held by the Hon'ble Supreme Court in the Malabar Industrial Co. Ltd.'s case, is not an expression of art and is not defined in the Act and, therefore, must be understood in its ordinary meaning. It is of wide import and is not confined to the loss of tax [see Dawjee Dadabhoy & Co. (supra), CIT vs. T. Narayana Pai (1975) 98 ITR 422 (KAR), CIT vs. Gabriel India Ltd. (supra) and CIT vs. Smt. Minalben S. Parikh, (1995) 215 ITR 81 (Guj)].

5.3 At the same time, the words *"prejudicial to the interest of the revenue*", as observed in Dawjee Dadabhoy and Co. vs. S.P. Jain,

(1957) 311 ITR 872 (Calcutta), can only mean that *"the orders of assessment challenged are such as are not in accordance with law, in consequence whereof the lawful revenue due to the State has not been realized or cannot be realized.*" Thus, the Commissioner's exercise of revisional jurisdiction under the provisions of Section 263 cannot be based on whims or caprice. It is trite law that it is a quasi judicial power hedged in with limitation and not an unbridled and unchartered arbitrary power. The exercise of the power is limited to cases where the Commissioner on examining the records comes to the conclusion that the earlier finding of the AO was erroneous and prejudicial to the interest of the revenue and that a fresh determination of the case is warranted. There must be material to justify the Commissioner's finding that the order of the assessment was erroneous insofar as it was prejudicial to the interest of the revenue.

5.4 It is also trite that there is a fine, though subtle distinction, between *"lack of inquiry"* and *"inadequate inquiry"*. It is only in cases of *"lack of inquiry"* that the Commissioner is empowered to exercise his revisional powers by calling for and examining the

records of any proceedings under the Act and passing orders thereon. In Gabriel India Ltd. (supra), it was expressly observed:-

> *"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. vs. ITO, (1977) 106 ITR 1 (SC)]."*

5.5 It was further observed as under:-

> *"From the aforesaid definitions as 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 visualize 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 visualized 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 conclusion and such a conclusion cannot be termed to be erroneous simply because the Commissioner does not feel satisfied with the conclusion.

x x x x

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."

5.6 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.

5.7 The Hon'ble Madras High Court held in the case of CIT v Valliammal (D.) (1998) 230 ITR 695 (Mad) that assessment order made after considering all fact and information cannot be revised. Where the assessee had furnished the requisite information and the Assessing Officer had completed the assessment after considering and 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 justified in reversing the order of the commissioner and restoring that of the assessing officer. 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) (2006) 286 ITR (AT) 211, the Bangalore Bench of the ITAT held that where the A.O as examined and considered and issue, though not mentioned in the assessment order, it cannot be said that the order passed was erroneous. In CIT *v* Gabriel India Ltd. (1993) 203 ITR 108 (Bom), the Hon'ble Bombay High Court held that once the Assessing Officer has exercised the quasi-judicial power vested in him in accordance with law and arrived at a conclusion, such a conclusion cannot be considered erroneous simply because the commissioner does not feel satisfied with the conclusion. It may be that in the opinion of the commissioner, the order in question

is prejudicial to the interests of the revenue. But that by itself would not be enough to vest the commissioner with the powers of *suo motu* revision because the first requirement, namely, that the order is erroneous, is lacking.

5.8 The Hon'ble Delhi High Court in CIT vs. Sunbeam Auto Ltd 332 ITR 167 (Del) has opined in Para 17 of its order as under:-

> *"17. 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 keep in mind the distinction between "lack of inquiry" and "inadequate inquiry". If there was any inquiry, even inadequate that would not by itself give*

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."

5.9 In the instant appeal before us, it is not the Department's case that no information regarding the payments made to the cricketers was called for by the AO. That relevant details and documents were furnished by the assessee during the assessment proceedings and forms part of the record. Hence, no inference can be drawn that the AO has not examined the issue 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. It is clear that an order cannot be termed as erroneous unless it is not in accordance with law. This section does not visualize a case of substitution of the judgment of the Commissioner for that of the AO. Therefore, it cannot be held that in the instant case the AO's order was erroneous and prejudicial to the interest of the revenue within the terms of section 263 of the Act. Once the impugned issue was considered and examined by the Assessing Officer, Ld. Commissioner cannot set aside the order without recording a contrary finding. This will be contrary to Section 263 of the Act. Therefore, in view of the

factual matrix of the case and respectfully following the ratio of the various judicial pronouncements as discussed above, we are of the considered opinion that the impugned action of the Ld. CIT u/s 263 of the Act was patently illegal and is liable to be quashed. The proceedings u/s 263 of the Act are accordingly quashed.

6.0 Since, we have already quashed the proceedings u/s 263 of the Act and have allowed the assessee appeal challenging u/s 263 proceedings, the assessee's appeal challenging the quantum additions sustained by the Ld. CIT (A) becomes *in fructuous* and the same is dismissed as such.

7.0 In the final result, ITA No. 3225/Del/2013 is allowed whereas ITA no. 695/Del/2016 is dismissed as having become *in fructuous*.

Order pronounced in the open court on 11th October, 2018.

Sd/-	**Sd/-**
(G.D.AGRAWAL)	**(SUDHANSHU SRIVASTAVA)**
PRESIDENT	**JUDICIAL MEMBER**

BR
Dated: October, 2018

Copy forwarded to: -

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

True Copy

By Order

ASSTT. REGISTRAR

Date of dictation	10.10.2018
Date on which the typed draft is placed before the dictating Member	10.10.2018
Date on which the typed draft is placed before the Other Member	10.10.2018
Date on which the approved draft comes to the Sr. PS/PS	10.10.2018
Date on which the fair order is placed before the Dictating Member for pronouncement	11.10.2018
Date on which the fair order comes back to the Sr. PS/PS	22.10.2018
Date on which the final order is uploaded on the website of ITAT	22.10.2018
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	