IN THE INCOME TAX APPELLATE TRIBUNAL
BENGALURU BENCH 'B', BENGALURU

BEFORE SHRI. B. R BASKARAN, ACCOUNTANT MEMBER

AND

SHRI. LALIET KUMAR, JUDICIAL MEMBER

I.T.A No.782/Bang/2013
(Assessment Year : 2008-09)
AND
I.T.A No.594/Bang/2014
(Assessment Year : 2009-10)

M/s. United Breweries Ltd,
UB Tower, UB City, No.24, Vittal Mallya Road,
Bengaluru 560 001 .. Appellant
PAN : AABCT9826D

v.

Deputy Commissioner of Income-tax,
Circle – 12(4), Bengaluru .. Respondent

Assessee by : Smt. Anitha R, CA
Revenue by : Smt Neera Malhotra, CIT-DR

Heard on : 28.1.2019
Pronounced on : 22.03.2019

O R D E R

PER LALIET KUMAR, JUDICIAL MEMBER :

These are two appeals filed by the assessee against the separate orders of the CIT, Bangalore-III, Bengaluru, dt.27.03.2013 and 03.03.2014, for the assessment years 2008-09 and 2009-10

respectively, wherein the CIT, vide proceedings u/s.263 of the Act, has set aside the assessments.

The assessee has raised the following grounds of appeal:

A. Y. 2008-09 :

1. On the facts and in the circumstances of the case, the conditions precedent being absent the proceedings initiated U/s.263 of the Act was opposed to law and the order passed U/s.263 is liable to be cancelled.

2. On the facts there being no error much less an error prejudicial to the interest of revenue, the learned Commissioner of Income-tax ought to have refrained from invoking the provisions of Sec.263 of the Act.

3. The learned Commissioner of Income-tax ought to have appreciated that there being no error in the order of the Assessing Authority who after calling the evidence and after satisfying the evidence passed the assessment order, the proceedings initiated u/s.263 of the Act were opposed to law and unsustainable as held by the Hon'ble Supreme Court in various cases and accordingly the proceedings are liable to be cancelled.

4. The learned Commissioner erred in holding that the expenditure claimed was liable to be disallowed u/s.40a(ia) of the Act.

5. The learned Commissioner ought to have appreciated the provisions of Sec.194C, 194J and 194H of the Act were not applicable in respect of the expenditure claimed in the relevant year and consequently the disallowance suggested u/s.40a(ia) was un-warranted and accordingly there was no requirement of setting aside the assessment for a fresh adjudication in this regard.

6. On the facts the learned Commissioner ought to have accepted the explanation offered by the appellant and refrained from setting aside the assessment.

A. Y. 2009-10 :

1. On the facts and in the circumstances of the case, the conditions precedent being absent the proceedings initiated U/s.263 of the Act was opposed to law and the order passed U/s.263 is liable to be cancelled.

2. On the facts there being no error much less an error prejudicial to the interest of revenue, the learned Commissioner of Income-tax ought to have refrained from invoking the provisions of Sec.263 of the Act.

3. The learned Commissioner of Income-tax ought to have appreciated that there being no error in the order of the Assessing Authority who after calling the evidence and after satisfying the evidence passed the assessment order, the proceedings initiated u/s.263 of the Act were opposed to law and unsustainable as held by the Hon'ble Supreme Court in various cases and accordingly the proceedings are liable to be cancelled.

4. The learned Commissioner of Income-tax ought to have refrained from directing the assessing authority to disallow the provision towards expenditure alleging that the TDS provision u/s.194C(2), 194J, 194H and 194A were not complied with and consequently they were not liable to be allowed by applying the provisions of Sec.40a(ia) of the Act.

5. The learned Commissioner of Income-tax ought to have appreciated that the expenditure though accrued were not payable before the end of the accounting year and consequently the TDS provision were not applicable and no disallowance was required to be made u/s.40(a)(ia) of the Act.

6. On the facts the learned Commissioner of Income-tax ought to have accepted the explanation offered by the appellant and refrained from directing the assessing authority to disallow the claim of the appellant.

7. On the facts and in the circumstances of the case, the depreciation as claimed by the appellant on the Effluent Treatment Plant and Sewage Treatment Plant was correct and complete and accordingly no disallowance was called for.

8. The learned Commissioner ought to have appreciated that the appellant had let in all the evidence before the assessing authority to prove that the units were functioning for more 180 days and accordingly the depreciation had rightly been allowed in full by the Assessing Authority.

9. When the depreciation allowance was given on the basis of the adequate evidence furnished by the appellant, the order of the Assessing Authority did not suffer from any mistake for the learned Commissioner to assume jurisdiction u/s.263 of the Act and consequently the proceedings are bad in law and liable to be cancelled.

02. The brief facts for A.Y 2008-09 are that the assessee filed return of income showing income of Rs.80,19,35,473/-. The case was selected for scrutiny and assessment order u/s 143(3) dated 30.11.2010 was passed assessing the income at Rs 100,04,43,688 which was later rectified to Rs 108,16,84,718.

Subsequently the CIT, Bangalore -3 initiated proceedings u/s 263 of the Act, on the following issues :

i) TDS provisions are attracted on the various liabilities provided for, which has not suffered TDS and therefore disallowance u/s 40(a)(ia) was called for

ii) Depreciation claim @ 100% on the "Effluent treatment plant" when the records show that the assets were put to use for a period less than 180 days

Similarly, for A.Y 2009-10, the assessee filed return of income showing income of Rs.78,60,19,800/- subsequently revised to Rs.77,35,19,800/-. The case was selected for scrutiny and assessment order u/s 143(3) dated 21.12.2011 was passed assessing the income at Rs 96,16,99,983/-.

Subsequently the CIT, Bangalore -3 initiated proceedings u/s 263 of the Act, on the following issues :

i) TDS provisions are attracted on the various liabilities provided for, which has not suffered TDS and therefore disallowance u/s 40(a)(ia) was called for.

ii) Depreciation claim @ 100% on the "Effluent treatment plant" when the records show that the assets were put to use for a period less than 180 days.

iii) Interest u/s 244A amounting to Rs 17,38,707 was allowed in contravention of the provisions of the Act, as the amount of refund is less than 10% of the tax.

03. The assessee filed replies and submitted that the notices issued by the CIT are not sustainable as the powers of the CIT have not been correctly exercised. It was also submitted that once two views are possible then, the one view adopted by the AO, which is a plausible view should be considered and in that circumstances, the revision order passed under section 263 of the Act, is not maintainable.

04. On merits, with respect to the depreciation on the Effluent Treatment Plant (ETP for short), it was submitted that the assessee has claimed 100% depreciation though the plant was used for less than 180 days. It was submitted that the assessee has inaugurated its plant in May, 2007 itself and started the commercial production. However, before the start of commercial production, it is sine-qua-non that a working ETP should have been already installed.

05. With respect to the disallowance u/s.40(a)(ia), the assessee had provided for expenses relating to the years under consideration on estimated basis, pending receipt of bills from the concerned parties. The Ld CIT was of the view that as per the provisions of sec.194C(2), the assessee should have deducted tax at source. The Ld Pr. CIT has taken cognizance of this expenses so provided on the basis of note given in audit report. It is the case of the assessee that the view so entertained by Ld CIT is not sustainable as the

company has credited the audit fees, freight charges and other expenses on estimate basis. It was submitted that due taxes were deducted subsequently when the bills were actually received and the tax so deducted at source was paid before the due date for filing return of income. Further the assessee also relied upon the Board Circular No.1/2009, dt.27.03.2009. However, the CIT, without examining the submissions and record submitted by the assessee for both the assessment years, has concluded the proceedings u/s.263 by passing the detailed orders.

06. Aggrieved with the aforesaid orders of the Ld CIT, the assessee has come before us in the present appeals. During the course of hearing, the learned A R of the assessee submitted a detailed written submission on the various issues raised by the CIT in his order. Reliance was placed on the decision in the case of Torrent Pharmaceuticals Ltd.,(I.T.A. No. 164/Ahd/2018), wherein while dealing with a similar case of alleged non-enquiry by the A.O, the tribunal had held that the invocation of powers u/s 263 was not correct. The points made by the learned AR was that,

i) The assessee is a listed company and accounts are subjected to multiple audits by expert professionals. The assessment is also carried out on year-to-year basis. In such a scenario, Ordinarily, it is only in a very gross case of inadequacy in inquiry and lack of application of mind that the order of AO is open to attack as erroneous

ii) The CIT ought to have made inquiry on the issue himself if so considered expedient to at least prima facie demonstrate that the action of the AO, which rendered the order erroneous, has also caused prejudice to the Revenue. Merely because the expectations of the Revisional Commissioner are purportedly not met, it should not necessarily trigger revisional action under s.263 of the Act in every case. The discretion given to the supervisory authority is expected to exercise in a judicial manner having regard to the totality of facts.

iii) The CIT has not given any cogent rebuttal in its order as to how the so called inadequacies in the enquiries made has dented the ultimate outcome in assessment order. The action of the Revisional Commissioner requires to be objectively justifiable and cannot be a mere ipse dixit. The CIT ought to have made some elementary inquiry himself to unearth alleged error in the order of the AO which caused prejudice to the Revenue. Instead, the CIT has merely alleged absence of inquiry and non-application of mind without showing any systematic efforts on his part to support the allegations.

iv) The Revisional Commissioner is expected show that the view taken by the AO is wholly unsustainable in law before embarking upon exercise of revisionary powers. The revisional powers cannot be exercised for directing a fuller inquiry to merely find out if the earlier

view taken is erroneous particularly when a view was already taken after inquiry. If such course of action is permitted, Revisional Commissioner can possibly find fault with each and every assessment order without himself making any inquiry or verification and without establishing that assessment order is not sustainable in law. This would inevitably mean that every order of the lower authority would thus become susceptible to Section 263 of the Act and, in turn, will cause serious unintended hardship to the tax payer concerned for no fault on his part. Apparently, this is not intended by the Explanation.

v) Howsoever wide the scope of Explanation 2(a) may be, its limits are implicit in it. It is only in a very gross case of inadequacy in inquiry or where inquiry is per se mandated on the basis of record available before the AO and such inquiry was not conducted, the revisional power so conferred can be exercised to invalidate the action of AO. The AO in the present case has not accepted the submissions of the assessee on various issues summarily but has made inquiry and verifications.

vi) It was therefore submitted that the foundation for exercise of revisional jurisdiction is missing in the present case and hence the order u/s 263 deserves to be cancelled.

7. As regards the facts of the individual issues, the assessee made the following submissions:

TDS on year-end provisions:

7.1 It was submitted that the only reason for setting aside the assessment by the CIT was the note in the Audit report on the issue of TDS on year-end provisions (Clause 17(f) in Form 3CD), whereas in that note itself, it has been explained that the provisions have been made in expenditure accounts on estimate basis as suppliers' bills/ invoices were not received. The Note referred to by the CIT itself mentions that TDS is not applicable and that the note has been reported as a matter of abundant precaution. Also, the Appendix to the Audit report referred to in the note shows clearly that the provisions have been made only under expenditure accounts and not on supplier's accounts and has been done on an estimate basis. It was also on record that such provisions have been adjusted against the bills received in the months of April/ May of the next year and TDS has been paid on such bills/ invoices before the due date of return. The various decisions of the Hon'ble tribunal that in such cases TDS is not applicable are squarely applicable to the facts of the case. If the CIT has considered the submissions and recorded filled by the assessee, he would have come to know that TDS was not applicable at all. The details were available on record. The Ld A.R submitted that the Ld CIT has taken support of provisions of sec.194C(2) to hold that the assessee should have deducted tax at source from the provisions so made. He submitted that the assessee had not received the bills from the service providers and hence as

per accounting principles, it had created provision for expenses for the expenses relating to the year. He submitted that the liability to deduct tax at source shall arise only when the bills were received from the concerned suppliers/service providers. Accordingly he submitted that the auditors have mentioned in the notes that the liability to deduct tax at source did not arise on the provisions so made.

7.2 It was also submitted that when the A.O has examined the audit report, there was no reason to hold that the A.O has not examined this aspect. It is settled principle that merely because the assessment order does not explicitly state that a particular issue has been examined does not mean that the issue has not been examined by the A.O. However, the CIT mechanically held that no enquiry was made by the A.O and set aside the assessment, thereby exercising the revisional power without any foundation. The CIT has failed to make out a case that proper enquiry has not been made, which has resulted in the order being erroneous and prejudicial to Revenue. The order was neither erroneous nor prejudicial to revenue. There was no foundational basis for invoking the provisions of Section 263.

7.3 Further, the learned AR submitted the assessee furnished full details of the liabilities created during the year end which has been paid in the months of April/ May of the next year and TDS has been paid on such payments. It was submitted that all these details were available on the record of the A.O, which could have been easily verified and were also filed before CIT. It was submitted that all

these details along with the payment details have been entered in the quarterly TDS returns which have been filed on time and were available with the A.O, which could have been verified. It was also submitted that these details were furnished to the CIT also, during the proceedings u/s 263 and if only the CIT had made even a cursory enquiry, he could have easily deduced that the TDS payments have been made before the due date of filing of the return of income, as per law and no disallowance was warranted. Instead, the CIT has merely remanded the matter the A.O for a fresh examination, which is not in tune with law and the decisions of the Courts in this regard.

7.4 It was also submitted by the assessee that the ITO (TDS) has initiated proceedings u/s 201 and 201A and has since accepted that the payments have been made. The AR, during the course of hearing, furnished a copy of order passed under 201 and 201A confirming the deposit of TDS before the due date for filing the return of income. In the ITO (TDS) order, it was mentioned as under:

Order U/s.201(1A) and demand notice for A.Y. 2008-09:

ORDER UNDER SECTION 201(1A) OF THE I.T. ACT,1961

The assessee M/s. United Breweries Limited is an Indian Company. The company is engaged in the business of Export Sales, Lease rentals and beverages related activities. The assessee is also a deductor requiring to deduct tax as per the provisions of the chapter XVII-B of the Income-tax Act,1961. The company's registered office is located in Bengaluru at the above mentioned address

Information was received by this office that disallowance u/s.40(a)(ia) of the Act was made in assessee's case in the Assessment Order passed u/s.143(3) of the Act dated 26.02.2015 for the Assessment Year 2008-09(Financial Year 2007-08) passed by Deputy Commissioner of Income-tax, Circle-7(1)(1) Bangalore for non-deduction of TDS. A show

cause notice u/s.201(1) and 201(1A) dated 06.02.2018 was issued to the assessee asking assessee to show cause as to 'why the assessee should not be held to be as assessee in default u/s.201(1) of the Act and interest be levied u/s.201(1A) of the Act. Consequent to the change in incumbent a fresh notice dated 12.10.2018 was issued to the assessee.

The assessee's authorized representative Mr K Venkatesh appeared on various dates and filed the necessary submissions.

Section 201(1A) states :" *Without prejudice to the provisions of sub-section (1), if any such person, principal officer or company as is referred to in that sub-section does not deduct [15][the whole or any part of the tax] or after deducting fails to pay the tax as required by or under this Act, he or it shall be liable to pay simple interest at [16][one per cent for every month or part of a month] on the amount of such tax from the date on which such tax was deductible to the date on which such tax is actually paid [17][and such interest shall be paid before furnishing [17a][the statement] in accordance with the provisions of sub-section (3) of section 200]*".

Based on the submissions of the assessee it was confirmed that defaults were found on payment of interest for the delayed remittance. Therefore deductor is held to be an 'assesse in default' u/s 201(1A) .

The default of interest on delayed remittance u/s 201(1A) is RS.1,88,755 /

The total Tax liability for F.Y 2007-08 is –Rs 1,88,755 i.e Rupees One Lakh Eighty Eight Thousand Seven Hundred and Fifty Five only.

Demand Notice issued accordingly.

NOTICE OF DEMAND UNDER SECTION 156 OF THE INCOME-TAX ACT, 1961

TO TAN : BLRU00942E

M/s United Breweries Limited,
No.24, UB Tower, UB City, Vittal Mallya Road,
Bengaluru-560001

This is to give you notice that for the F.Y. 2007-08 (A.Y. 2008-09) a demand of Rs. 1,88,,755 details of which are given in the order passed u/s 201(1A) dated 24.10.2018, has been determined to be payable by you.

2. The amount should be paid to the Manager, authorized Bank / State Bank of India / Reserve Bank of India, at Bangalore within 30 days of the service of notice.

3. If you do not pay the amount within the period specified above, you shall be liable to pay simple interest at one percent for every month or part of a month from the date commencing after end of the period aforesaid in accordance with Sec.220(2).

4. If you do not pay the amount of the tax within the period specified above, penalty (which may be as much as the amount of tax in arrear) may be imposed upon you after giving you a reasonable opportunity of being heard in accordance with Section 221.

5. If you do not pay the amount within the period specified above, proceedings for the recovery thereof will be taken in accordance with Section 222 to 227, 229 and 232 of the Income-tax Act, 1961.

6. If you intend to appeal against the assessment / fine / penalty, you may present an appeal under Part A of Chapter XX of the Income-tax Act, 1961 to the Commissioner of Income-tax (Appeals)-13, Bangalore within thirty days from the date of receipt of this notice, in Form No.35, duly stamped and verified as laid down in that form.

7. ~~The amount has become due as a result of the order of the Deputy Commissioner of Income-tax (Appeals) / Deputy Commissioner of Income-tax / Commissioner of Income-tax (Appeals)-V / Chief Commissioner of Income-tax ..... Under section ..... of the Income-tax Act, 1961. If you intend to appeal against the aforesaid order, you may present an appeal under Part B of Chapter XX of the said Act to the Income-tax Appellate Tribunal, Bangalore Bench within sixty days from the date of receipt of that order, in Form No.36, duly stamped and verified as laid down in that form.~~

Disallowance u/s 40(a) (ia)

SL. No.	Nature of Expenses provision	Section	Expense Amount Provision	Expense Amount Actual Paid	TDS Amt Paid	Interest (Rs.)
1	Freight Expenses	194 C	1126,74,472	1127,15,901	16,14,535	58,967
2	Audit Fees	194 J	56,60,000	58,85,000	6,66,771	41,983
3	Professional Charges	194 J	17,70,668	17,82,818	1,48,132	10,005
4	Del Credre Commission	194 H	168,79,203	168,84,800	15,53,973	62,352
5	Contract Payables	194 C	12,11,598	12,11,598	13,090	234
6	Rent Payables	194 I	2,45,174	2,45,174	27,778	3,056
7	Electronic Data Processing Cost	194 C	7,22,965	7,22,965	16,339	1,109
8	Computer Lease rentals	194 I	16,36,100	16,36,100	1,85,372	11,050
	TOTAL		**1408,00,180**	**1410,84,356**	**42,25,990**	**1,88,755**

Order U/s.201(1A) and demand notice for A.Y. 2009-10 :

ORDER UNDER SECTION 201(1A) OF THE I.T. ACT,1961

The assessee M/s. United Breweries Limited is an Indian Company. The company is engaged in the business of Export Sales, Lease rentals and beverages related activities. The assessee is also a deductor requiring to deduct tax as per the provisions of the chapter XVII-B of the Income-tax Act,1961. The company's registered office is located in Bengaluru at the above mentioned address

Information was received by this office that disallowance u/s.40(a)(ia) of the Act was made in assessee's case in the Assessment Order passed u/s.143(3) of the Act dated 26.02.2015 for the Assessment Year 2009-10(Financial Year 2008-09) passed by Deputy Commissioner of Income-tax, Circle-7(1)(1) Bangalore for non-deduction of TDS. A show cause notice u/s.201(1) and 201(1A) dated 06.02.2018 was issued to the assessee asking assessee to show cause as to 'why the assessee should not be held to be as assessee in default u/s.201(1) of the Act and interest be levied u/s.201(1A) of the Act. Consequent to the change in incumbent a fresh notice dated 12.10.2018 was issued to the assessee.

The assessee's authorized representative Mr K Venkatesh appeared on various dates and filed the necessary submissions.

Section 201(1A) states :" *Without prejudice to the provisions of sub-section (1), if any such person, principal officer or company as is referred to in that sub-section does not deduct* [15]*[the whole or any part of the tax] or after deducting fails to pay the tax as required by or under this Act, he or it shall be liable to pay simple interest at* [16]*[one per cent for every month or part of a month] on the amount of such tax from the date on which such tax was deductible to the date on which such tax is actually paid* [17]*[and such interest shall be paid before furnishing* [17a]*[the statement] in accordance with the provisions of sub-section (3) of section 200]*".

Based on the submissions of the assessee it was confirmed that defaults were found on payment of interest for the delayed remittance. Therefore deductor is held to be an 'assesse in default' u/s 201(1A) .

The default of interest on delayed remittance u/s 201(1A) is RS 3,48,298/-

The total Tax liability for F.Y 2008-09 is –Rs 3,48,298/- i.e Rupees Three Lakhs Forty Eight Thousand Two Hundred and Ninety Eight only.

Demand Notice issued accordingly.

NOTICE OF DEMAND UNDER SECTION 156 OF THE INCOME-TAX ACT, 1961

TO

TAN : BLRU00942E

M/s United Breweries Limited,
No.24, UB Tower, UB City, Vittal Mallya Road,
Bengaluru-560001

This is to give you notice that for the F.Y. 2008-09 (A.Y. 2009-10) a demand of Rs. 3,48,298/- details of which are given in the order passed u/s 201(1A) dated 24.10.2018, has been determined to be payable by you.

2. The amount should be paid to the Manager, authorized Bank / State Bank of India / Reserve Bank of India, at Bangalore within 30 days of the service of notice.

3. If you do not pay the amount within the period specified above, you shall be liable to pay simple interest at one percent for every month or part of a month from the date commencing after end of the period aforesaid in accordance with Sec.220(2).

4. If you do not pay the amount of the tax within the period specified above, penalty (which may be as much as the amount of tax in arrear) may be imposed upon you after giving you a reasonable opportunity of being heard in accordance with Section 221.

5. If you do not pay the amount within the period specified above, proceedings for the recovery thereof will be taken in accordance with Section 222 to 227, 229 and 232 of the Income-tax Act, 1961.

6. If you intend to appeal against the assessment / fine / penalty, you may present an appeal under Part A of Chapter XX of the Income-tax Act, 1961 to the Commissioner of Income-tax (Appeals)-13, Bangalore within thirty days from the date of receipt of this notice, in Form No.35, duly stamped and verified as laid down in that form.

7. ~~The amount has become due as a result of the order of the Deputy Commissioner of Income-tax (Appeals) / Deputy Commissioner of Income-tax / Commissioner of Income-tax (Appeals)-V / Chief Commissioner of Income-tax ..... Under section ..... of the Income-tax Act, 1961. If you intend to appeal against the aforesaid order, you may present an appeal under Part B of Chapter XX of the said Act to the Income-tax Appellate Tribunal, Bangalore Bench within sixty days from the date of receipt of that order, in Form No.36, duly stamped and verified as laid down in that form.~~

Disallowance u/s 40(a) (ia)

SL. No.	Nature of Expenses provision	Section	Expense Amount Provision	Expense Amount Actual Paid	TDS Amt Paid	Interest (Rs.)
1	Freight Expenses	194 C	1105,16,347	1105,16,350	20,87,538	80,451
2	Audit Fees	194 J	47,90,000	48,60,418	5,50,685	42,000
3	Professional Charges	194 J	47,87,171	47,90,155	5,19,499	43,823
4	Del Credre Commission	194 H	137,91,325	138,68,192	12,62,508	85,029
5	Contract Payables	194 C	58,20,378	58,41,148	35,936	1,311
6	Rent Payables	194 I	4,66,567	4,66,667	52,873	52,873
7	Interest Payables	194A	12,95,232	12,95,232	2,62,909	34,178
8	Computer Lease rentals Payables	194 I	10,36,220	10,44,628	2,36,713	4,734
9	Electronic Data Processing	194 C	6,21,660	6,45,255	73,107	3,899
	TOTAL		**1431,24,895**	**1433,28,044**	**50,81,768**	**3,48,298**

Depreciation on Effluent/ Sewage treatment plant

7.5 On this issue, the learned AR submitted that the Certificate from the Pollution Control Board (PCB) dated 15.08.2007 allowing the company to operate the plant w.e.f that date shows that the plant

was put to use in August 2007. Also, even in the document relied upon by the CIT, all the invoices relating to supply and installation are before August and only few invoices related to installation like additional pipes, painting etc., and commissioning are after August.

08. Per contra, the learned DR strongly defended the order of the CIT and drawn our attention to various paragraphs of order and She relied upon the order giving effect order passed by the AO dated 26.08.2013, in which, AO had confirmed the additions in terms of direction of CIT. The Ld D.R placed her reliance on the decision rendered by Hon'ble Calcutta High Court in the case of Sigma Commodities P Ltd vs. ITO (2014)(365 ITR 276), and submitted that the assumption of incorrect facts or incorrect application of law may be brought within the purview of erroneous order. The Ld D.R submitted that the AO has not discussed anything on the impugned issues in both the years and hence the assessment orders are rendered erroneous and in support of this proposition, the DR relied upon the decision of Jurisdictional High court in the matter of Infosys Technologies Ltd 17 Taxmann.com 203. The Ld D.R also furnished a copy of assessment order passed by the AO in pursuance of revision order passed by Ld CIT and submitted that the AO has made the additions pointed out by Ld CIT.

09 We have considered the rival contentions and submissions including the decisions relied upon by both the sides. At the time of argument the Ld. AR had relied on the order passed by the AO u/s.201 & 201(1A) and the Ld. DR relied on the order giving effect passed by the AO pursuant to direction issued by the CIT u/s.263 of

the Act. In our view, we have to test the legality of the order passed by the CIT u/s.263 of the Act, based on the material available with him at the time of passing of the order.

Under the provisions of the Act, the CIT may call for and examine the record of any preceding this Act and pass an order only if the twin conditions are satisfied, namely, the order passed by the Assessing Officer is erroneous; and also prejudicial to the interest of the revenue. The Hon'ble Supreme Court in the case of Malabar Industrial Co. Ltd. Vs CIT (2000) 243 ITR 83 (supra) has held that both of the above conditions have to be satisfied. It has been held that,

> *"A bare reading of section 263 of the Income-tax Act, 1961, makes it clear that the prerequisite for the exercise of jurisdiction by the Commissioner suo motu under it, is that the order of the Income-tax Officer is erroneous in so far as it is prejudicial to the interests of the Revenue. 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 interests of the Revenue. If one of them is absent-if the order of the Income-tax Officer is erroneous but is not prejudicial to the Revenue or if it is not erroneous but is prejudicial to the Revenue-recourse cannot be had to section 263(1) of the Act. The provision cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer it is only when an order is erroneous that the section will be attracted. An incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the order being erroneous. In the same category fall orders passed without applying the principles of natural justice or without application of mind. The phrase "prejudicial to the interests of the Revenue" is not an expression of art and is not defined in the Act. Understood in its ordinary meaning it is of wide import and is not confined to loss of tax. The scheme of the Act is to levy and collect tax in accordance with the provisions of the Act and this task is entrusted to the Revenue. If due to erroneous order of the Income-tax Officer, the Revenue is*

> *losing tax lawfully payable by a person, it will certainly be prejudicial to the interests of the Revenue. The phrase "prejudicial to the interest of the Revenue" has to be read in conjunction with an erroneous order passed by the Assessing Officer. Every loss of revenue as a consequence of an order of the Assessing Officer, cannot be treated as prejudicial to the interests of the Revenue, for example, when an Income-tax Officer adopted one of the courses permissible in law and it has resulted in loss of revenue, or where two views are possible and the Income-tax Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the Revenue unless the view taken by the Income-tax Officer is unsustainable in law."*

A similar view has also been taken by the Hon'ble Apex Court in the case of CIT Vs Max India Ltd. (2007) 295 ITR 282 (supra), wherein it has been held as under:

> *"The phrase "prejudicial to the interests of the Revenue" in section 263 of the Income-tax Act, 1962, has to be read in conjunction with the expression "erroneous" order passed by the Assessing Officer, Every loss of revenue as a consequence of an order of the Assessing Officer cannot be treated as prejudicial to the interests of the Revenue. For example, when the Assessing Officer adopts one of two courses permissible in law and it has resulted in loss of revenue, or where two views are possible and the Assessing Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the Revenue, unless the view taken by the Assessing Officer is unsustainable in law."*

That the twin tests of the order being erroneous and prejudicial to the interest of revenue are both necessary has been elaborated by the Hon'ble Rajasthan High court in the case of CIT-1, Jaipur vs M/s Green Triveni Developer, ITA No. 114 / 2015, wherein it was held that,

9. It is no longer res integra that the revisional jurisdiction available to a Commissioner under section 263 of the Act is essentially circumscribed by the determinant that the order of the Assessing Officer is erroneous so much so that it is prejudicial to the interests of the Revenue. This statutory enjoinment carves out an extremely constricted ambit of such discretionary jurisdiction. The word "considers" applied in the statutory provision involved, signifies a genuine satisfaction of that authority that the order of the Assessing Officer is erroneous and that the interests of the Revenue is prejudicing thereby. Any exercise of the revisional jurisdiction, bereft of such satisfaction and/or finding that the order of the Assessing Officer is erroneous and that it is prejudicial to the interests of the Revenue and that too, based on tangible materials on record, is impermissible rendering the resultant order void.

10. Judged on the above touchstone, we are of the unhesitant opinion, having regard to the materials on record, that no interference with the impugned order of the learned Tribunal is warranted, in the facts and circumstances of the case. No substantial question of law, as contemplated by section 260A of the Act, exists to be examined.

The principle that emerges out of the above cited decisions are that the twin requirement of the order being erroneous and prejudicial to the interests of revenue should be satisfied and that the CIT should invoke the powers u/s 263 only after an enquiry by him to establish the twin conditions.

10. There is one more condition imposed upon the Ld CIT before invoking revisional power u/s 263 of the Act. In the matter of Pr. CIT v. Delhi Airport Metro Express P. Ltd [ITA.705/2017, dt.05.09.2017], ITO v. D.G. Housing Projects Ltd. 2012 (343) ITR 329 (Delhi), decided by Delhi High Court and also in the case of CIT v. Nirav Modi, 390 ITR 292, it was held that it is incumbent on the CIT to conduct some minimum enquiry before invoking the

jurisdiction u/s.263 and set aside the order passed by the AO. In the case of Nagesh Knitwears P Ltd (2012)(345 ITR 135), the Hon'ble Delhi High Court has elucidated and explained the scope of the provisions of sec. 263 of the Act and the same has been extracted by the Delhi High court in the case of CIT Vs. Goetze (India) Ltd (361 ITR 505) as under:-

> "Thus, in cases of wrong opinion or finding on merits, the Commissioner of Income tax has to come to the conclusion and himself decide that the order is erroneous, by conducting necessary enquiry, if required and necessary, before the order under section 263 is passed. In such cases, the order of the Assessing Officer will be erroneous because the order is not sustainable in law and the said finding must be recorded. The Commissioner of Income tax cannot remand the matter to the Assessing Officer to decide whether the findings recorded are erroneous. In cases where there is inadequate enquiry but not lack of enquiry, again the Commissioner of Income tax must give and record a finding that the order/inquiry made is erroneous. This can happen if an enquiry and verification is conducted by the Commissioner of Income tax and he is able to establish and show the error or mistake made by the Assessing officer, making the order unsustainable in law. In some cases possibly though rarely, the Commissioner of Income tax can also show and establish that the facts on record or inferences drawn from facts on record per se justified and mandated further enquiry or investigation but the

> Assessing officer had erroneously not undertaken the same. However, the said finding must be clear, unambiguous and not debatable. The matter cannot be remitted for a fresh decision to the Assessing Officer to conduct further enquiries without a finding that the order is erroneous. Finding that the order is erroneous is a condition or requirement which must be satisfied for exercise of jurisdiction under section 263 of the Act. In such matters, to remand the matter to the Assessing Officer would imply and mean the Commissioner of Income tax has not examined and decided whether or not the order is erroneous but has directed the Assessing Officer to decide the aspect/question….” Similar view has been expressed by Hon’ble Madras High Court in the case of CIT Vs. Amalgamations Ltd (238 ITR 963).

The law interpreted by the High Courts makes it clear that the Ld Pr. CIT, before holding an order to be erroneous, should conduct minimum enquiries or verification in order to show that the finding given by the assessing officer is erroneous.

11. On the basis of above discussed legal propositions on the revisional power of Ld CIT, we are required to examine whether the action of the CIT fulfilled the twin test or not and whether the Ld CIT has conducted minimal enquiry or not. With respect to the ground pertaining non-deduction of TDS from the year-end provisions, the CIT has relied on the Form 3CD forming part of the audit report, where the auditor has mentioned Clause 27B(i) is reproduced below:

A. Clause 27(b)(i) - Tax deductible but not deducted at all (Refer Note 1 below)

SL. No.	Account Head	Section	Expense Amount (Rs.)	Tax deductible but not deducted (Rs.)
1	Freight Expenses [Refer Note 2 below]	194 C	112,674,472	2,553,204
2	Audit Fees [Refer Note 2 below]	194 J	5,660,000	641,278
3	Professional Charges [Refer Note 2 below]	194 J	1,770,668	200,617
4	Del Credre Commission [Refer Note 2 below]	194 H	16,879,203	1,912,414
5	Contract Payables [Refer Note 2 below]	194 C	1,211,598	27,455
6	Rent Payables [Refer Note 2 below]	194 I	245,174	27,778
7	EDP Cost [Refer Note 2 below]	194 C	722,965	16,382
8	Computer Lease rentals [Refer Note 2 below]	194 I	1,636,100	370,740
9	Advertisement Expenses [Refer Note 3 below]		Refer Note 3 below	Refer Note 3 below
TOTAL			140,800,180	5,749,868

As far as the issue of TDS on year-end provisions, admittedly the CIT has based his decision on the observations made in the Audit report, which was very much before the A.O when he made the assessment. Also, the assessee has submitted the full invoice-wise details of the payments made out of the liabilities created, which was very much on record. **The assessee has also given the details of payment of the TDS on these amounts,** from which it is seen that all payments have been made in the months of April/ May of the next financial year, which is well before the due date of filing of the return of income. Also, the assessee had filed TDS return showing the details of the TDS payments on these invoices, which were also available on record. The case of Ld CIT, as stated earlier, that the assessee should have deducted tax at source from the provisions so made and for this purpose, he has relied upon the provisions of sec.194C(2) of the Act which reads as under:-

> "194C(2) : Where any sum referred to in sub-section (1) is credited to any account, whether called "Suspence Account" or by any other name, **in the books of account of the person liable to pay such income**, such crediting shall be deemed to

be credit of such income to the account of the payee and the provisions of this section shall apply accordingly."

Under section 194C(1), a person is liable to deduct tax at source from the payment at the time of credit of such sum to the account of the contractor or at the time of payment thereof in cash or by issue of a cheque or draft or by any other mode, whichever is less. It appears that certain persons were crediting the "Suspence Account" or such kind of account in any other name, instead of crediting the amount to the account of contractor, in order to escape the liability to deduct tax at source. Hence the provisions of sec.194C(2) of the Act makes it clear that such kind of crediting Suspense Account or such type of account in any other name shall be deemed to be credit of such income to the account of payee.

The crucial words used in sec.194C(2) is "in the books of the person liable to pay such income". The provisions of sec.194C(2) shall apply only if the liability to pay such income has already arisen to the assessee. In the instant case, it is the submission of the assessee that the liability to pay has not arisen, since it has not received the bills from the suppliers/service providers. There is merit in the said submissions. The liability of the assessee to make payment shall arise only if it receives bills from the concerned supplier/service provider. Since the assessee has already availed services, as per the accounting principles, it had provided for those expenses on estimate basis by crediting the account of "Provision for expenses". Accordingly it was submitted that the credit is not in respect of suppliers account but to expenditure account.

Accordingly it was submitted that the "Provision for expenses account" cannot be considered as "Suspense Account" as referred to in sec. 194C(2) of the Act, since the expenses were accounted for on estimate basis. Accordingly, the auditors have also expressed the opinion that the TDS liability shall not arise on the provisions of expenses so made on estimate basis.

In our view, there is merit in the contentions of the assessee. There is no dispute with regard to the fact that the assessee has deducted tax at source when the actual bills were received by the assessee from the suppliers/service providers. The said bills were debited to the "Provision for expenses" account and hence there is no question of any double deduction. The TDS so deducted has been paid within the due dates. On these set of facts, we are of the view that the interpretation given by Ld CIT to the provisions of sec.194C(2) of the Act does not appear to be correct, since the liability to the assessee to make payment shall arise only upon receipt of bills. It was submitted that the assessee has furnished all these details before the AO and the AO has also accepted the same without making any addition. Hence, in our view, it has to be held that the view so taken by the AO is one of the possible views, in which case, the revision made by the Ld CIT on this issue is not sustainable.

12. The CIT had passed the orders for AY 2008-09 and 2009-10 on 01.04.2013 and 06.03.2014. By that time the amendment to provision to section 40(a)(ia) was brought into the statute book w.e.f.01.04.2010.

40a(*ia*) any interest, commission or brokerage, [91][rent, royalty,] fees for professional services or fees for technical services payable to a resident, or amounts payable to a contractor or sub-contractor, being resident, for carrying out any work (including supply of labour for carrying out any work), on which tax is deductible at source under Chapter XVII-B and such tax has not been deducted or, after deduction, [92]**[***has not been paid on or before the due date specified in sub-section (1) of section 139 :***]**

[93]**[Provided *that where in respect of any such sum, tax has been deducted in any subsequent year, or has been deducted during the previous year but paid after the due date specified in sub-section (1) of section 139, such sum shall be allowed as a deduction in computing the income of the previous year in which such tax has been paid.*]**

The above said provisions states that in case the assessee had delayed in depositing the TDS amount in the year under consideration, but had deposited the same before the due date for filing return of income, then the assessee would be entitled to the deduction of the said expenditure, i.e., no disallowance u/s 40(a)(ia) is called for. The above said section along with the proviso would make is clear that the disallowance u/s 40(a)(ia) is not required to be made, if the TDS amount is paid on or before the due date for filing return of income.

13. By virtue of the decisions rendered in the matter of Virgin Creations (Calcutta order dated 23.11.2011); CIT v. Ansal Landmark Township P. Ltd [61 taxmann.com 45], the amendment made to sec.40(a)(ia) by Finance Act, 2010 was held to be declaratory and curative in nature with retrospective effect from 01.04.2005. Similar proposition of law was also in down rendered by the coordinate bench in the matter of Piyush C. Mehta [ITA.1321/Mum/2009, dt.11.04.2012], holding that the provision is retrospective in nature and would be applicable from 01.04.2005.

However the CIT while invoking the jurisdiction u/s.263 of the Act, mainly relied upon the circular issued by the Board in the year 2009 and had ignored the amendment brought into the statute by the Finance Act, 2010. In our view, the order passed by the CIT u/s.263 was based on a wrong premise and on incorrect interpretation of the provisions of sec. 194C. Further the CIT has also not considered the amended provision which came into effect from 01.04.2010, which was held to applicable retrospectively from 01.04.2005. In this view of the matter, we are of the view that the Ld CIT has failed in his duty to make minimal enquiry as mandated u/s 263 of the Act. Since there is no requirement to make any disallowance u/s 40(a)(ia) of the Act as per the amended provision and also as per the provisions of sec.194C(2) of the Act, it cannot be held that the impugned assessment orders are prejudicial to the interests of the revenue. Hence one of the twin mandatory conditions fails in the facts of the present cases.

14. Further we also notice that the CIT in para 5.2 records that the details were available on the record. However despite the details being available with the CIT, with respect to TDS provisions made by the assessee on the last month of the of the due date for filing the return of income and deposit of tax before the due date of filing of the return, however, the CIT has glossed over these essential findings and has categorically mentioned that the AO has not made any enquiries in this regard. It was incumbent upon the CIT to conduct basic enquiry himself once the CIT records that the enquiries were not made by the AO to verify the record. However

no enquiries were made by the CIT to verify the record and based on the audit reports the CIT has passed the impugned order.

15. In our opinion it requires minimal effort to find out from the record to ascertain whether the assessee had deposited the TDS or not before filling the return of income, as it is common knowledge that Ld CIT by inspecting record, or calling the report from the AO or himself verifying it from e-portal of the department can easily verify all the deposits made by the assessee which had debited in his account and credited in the account of Payee. Not even a cursory enquiry was made by the CIT to ensure the fulfillment of twin conditions of the order being erroneous and prejudicial to revenue.The CIT without even looking from this angle, and without verifying facts whether the TDS was deposited, in the Government account or not before the date of filing of the return of income had passed order. In the present case, mere reliance on the audit report by the CIT selectively (by ignoring the opinion of TDS liability) for coming to the conclusion that there is a loss to the Revenue does not hold good, as it is a fact that the TDS were deposited prior to filing the returns of income which could be ascertained with little efforts by the CIT.

16. As noticed earlier, this aspect is covered in favour of assessee in the matter of Pr. CIT v. Delhi Airport Metro Express P. Ltd [ITA.705/2017, dt.05.09.2017] , ITO v. D.G. Housing Projects Ltd. 2012 (343) ITR 329 (Delhi),decided by Delhi High Court and CIT v. Nirav Modi, 390 ITR 292 wherein it was held that it is incumbent on the CIT to conduct some minimum enquiry before

invoking the jurisdiction u/s.263 and set aside the order passed by the AO. In the present case no such enquiry was conducted by the CIT. In view of the discussions made earlier, it can also be said that the AO has taken a plausible view in not making the addition u/s 40(a)(ia) of the Act.

17. The Ld D.R placed her reliance on the decision rendered by the jurisdictional High Court in the case of Infosys Technologies Ltd (supra). We have gone through the said decision and notice that the issue that was considered by Ld CIT in the above said case was with regard to the deduction of tax claimed under DTAA entered with Canada and Thailand. The AO allowed the deduction as claimed by the assessee without specifying the manner of computation in the assessment order. It is in the above said context, the Hon'ble Karnataka High Court has held that the assessment order is rendered erroneous and accordingly rejected the contentions that the assessee had submitted the relevant details before AO and hence there should be a conclusion that the AO has applied his mind. Thus, we notice that the Hon'ble jurisdictional High Court has rendered its decision on the facts prevailing in the above said case. Hence we are of the view that the revenue cannot take support of the above said decision.

18. To sum up, the order of the Commissioner setting aside the order passed by the assessing officer for non-deduction of tax (TDS) is required to be set aside firstly Commissioner has not correctly interpreted the provisions of sec.194C(2) of the Act and also did not consider the law amended in sec.40(a)(ia) which is held

to be applicable retrospectively from 1 April 2005; secondly the order of the Commissioner was not correct as the Commissioner failed to verify and conduct the minimal enquiry about the status of alleged non-deduction of TDS and deposit of TDS in the government treasury before the due date for filing the return of income, despite availability of material on record and thirdly, the order passed by the CIT does not satisfy both the twin tests laid by the Hon'ble Supreme Court in Malabar Industrial Co.(supra) and Max India Ltd (supra). On account of these reasons, exercise of power by CIT u/s.263 cannot be sustained. In view of the above, the order passed by the CIT u/s.263, for non-deduction of TDS, for both the assessment years is required to be quashed and accordingly we quash the same.

19. As regards the issue of depreciation on the ETP/ STP, the action of the CIT was based on the dates mentioned in the invoices which were submitted by the assessee. The CIT has examined the records, made preliminary finding that some of the invoices related to the machinery are of dates after August, thereby leading to a suspicion that the machinery could have been in use for less than 182 days. This finding of fact arising out of the enquiry of the CIT is not controverted by the assessee. While the assessee has tried to explain the same, the fact remains that this issue needed verification and this requirement has arisen after a preliminary enquiry by the CIT. Therefore, we do not find any infirmity in the action of the CIT. As regard the conclusion recorded by the CIT for 2009-10 Ld. AR for the assessee had submitted no objection to the addition of

depreciation, the same issue requires no adjudication and verification.

The Grounds raised on this issue are dismissed.

20. As regards the issue of interest u/s 244A wrongly allowed to the assessee, it is the contention of the assessee that it is a computational issue and remedy lies in rectification u/s 154 and not revision u/s 263. It is true that various remedies available for rectifying the mistakes of the assessing officer operate in their own sphere and use of one remedy in a place where the other needs to be used may not be appropriate. However, in this case, considering that the mistake of grant of refund u/s 244A was detected after an enquiry on the amount of tax and considering that the assessee has itself accepted the action of the CIT, the action of the CIT is upheld.

21. In the result, both the appeals of the assessee are partly allowed.

Order pronounced in the open court on 22nd day of March, 2019.

Sd/-	Sd/-
(B. R BASKARAN)	(LALIET KUMAR)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Bengaluru
Dated : 22.03.2019

MCN*

Copy to:

1. The assessee
2. The Assessing Officer
3. The Commissioner of Income-tax
4. Commissioner of Income-tax(A)
5. DR
6. GF, ITAT, Bangalore

By order

Assistant Registrar,
Income Tax Appellate Tribunal,
Bangalore.