

**आयकर अपीलीय अधिकरण, इन्दौर न्यायपीठ, इन्दौर**

**IN THE INCOME TAX APPELLATE TRIBUNAL  
INDORE BENCH, INDORE**

**BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER  
AND  
SHRI MANISH BORAD, ACCOUNTANT MEMBER**

**ITA No.824/Ind/2018**  
**Assessment Year: 2007-08**

Prabhakar Paper Mills Pvt. Ltd. F-101-102, "B" R.B. Rower, Eden Garde Chuna Bhatti, Kolar Road, Bhopal (Appellant)	<b><u>बनाम/</u></b> Vs.	Pr. CIT-2 Bhopal (Revenue)
PAN:		
Appellant by	Shri S.S. Deshpande, CA	
Respondent by	Smt. Ashima Gupta, CIT-DR	
<b>Date of Hearing:</b>	<b>06.06.2019</b>	
<b>Date of Pronouncement:</b>	<b>13.06.2019</b>	

**आदेश / O R D E R**

**PER MANISH BORAD, A.M:**

This appeal at the instance of assessee pertaining to Assessment Year 2007-08 is directed against the order of Pr. Commissioner of Income Tax-2, Bhopal, (in short 'Pr. CIT'), dated 31.07.2018 framed u/s 263 of the Income Tax Act 1961(hereinafter called as the 'Act').

2. Brief facts of the case as culled out from the records are that the assessee is a Private Limited Company engaged in Manufacturing of Papers. Return of income filed on 31.10.2007 declaring income at Rs.Nil. Case selected for scrutiny and assessment u/s 143(3) of the Act framed on 31.12.2009. The Learned Assessing Officer ( in short Ld. AO) while framing the assessment order made on addition towards unexplained creditors at Rs.34,22,380/- treating them as bogus creditors. However, income assessed at Rs. Nil as the assessee has accumulated losses and Ld. AO allowed the set off brought forward loss of earlier years at Rs.54,00,565/- as against Rs. 19,78,185/- claimed by the assessee.

3. Against this addition assessee preferred an appeal before the Ld. CIT(A) but partly succeeded. Against the order of Ld. CIT(A) dated 02.01.2014 both the assessee and revenue came in appeal before the Tribunal and vide order dated 05.10.2015 in ITANo.248 &226/Ind/2014,Tribunal restored the issue of verification of genuineness of five creditors to the file of the Ld. AO with a direction that the assessee shall provide correct address ad details. Necessary verification shall be made by the Assessing Officer to test

the genuineness of the creditors totalling to Rs.10,73,727/-

4. In compliance to the directions given by the Tribunal vide order dated 05.10.2015. Ld. AO carried out the proceedings u/s 143(3) r.w.s. 254 of the Act and vide order dated 28.11.2016 confirmed the addition of Rs.10,19,818/- pertaining to 4 creditors holding them to be non-genuine.

5. Ld. Pr. CIT-2 invoked the powers vested with her u/s 263 of the Act and held that the order of the Ld. AO framed u/s 143(3) r.w.s 254 of the Act dated 28.11.2016 is erroneous and prejudicial to the interest of revenue as the Ld. AO has not made any inquiry, about the application of provisions of u/s 115JB of the Act for computing tax on Book Profit and directed the Ld. AO to frame assessment afresh in pursuance to the order u/s 263 of the Act.

6. Now, the assessee is in appeal before the Tribunal challenging the order of Ld. Pr. CIT framed u/s 263 of the Act raising following grounds of appeal:

*“1. That on the facts and in the circumstances of the case of the assessee, the order passed by the ld. CIT is barred by limitation.*

*2. That on the facts and in the circumstances of the case of the assessee, the Ld. CIT(A) was not justified in holding that the order passed by the AO is erroneous and prejudicial to the interest of the revenue.*

*3. That on the facts and in the circumstances of the case of*

*the assessee, the Ld. Commissioner of Income Tax(A) was not justified in holding that the provisions of section 115JB are applicable in the case of the assessee.”*

7. At the outset, Ld. counsel for the assessee submitted that the impugned order u/s 263 of the Act passed by Ld. Pr. CIT is barred by limitation and also exceeds the jurisdiction because the order framed by the ld. AO u/s 143(3) r.w.s 254 of the Act was for the limited purpose of adjudicating the issues of examining genuineness of five sundry creditors as per direction given by the Tribunal vide order dated 05.10.2015. There was no occasion with the Ld. AO to examine any other aspect other than to make compliance to the direction given in the order of the Tribunal. He further submitted that as regards original assessment framed u/s 143(3) of the Act dated 31.12.2009, time limit to frame the order u/s 263 of the Act stood expired on 31.03.2012 as per the provisions u/s 263(2) of the Act. He, therefore, prayed that the impugned order u/s 263 of the Act may be quashed.

8. Per contra, Learned Departmental Representative (Ld. DR) vehemently argued supporting the order of Pr. CIT.

9. We have heard rival contentions and perused the records placed before us. The sole issue raised by the assessee is

challenging the order passed by Ld. Pr. CIT u/s 263 of the Act contending that it is barred by limitation and Ld. Pr. CIT has erred in exercising the jurisdiction u/s 263 of the Act.

10. The ld. Pr. CIT assumed jurisdiction u/s 263 of the Act to revise assessment order framed u/s 143(3) r.w.s 254 of the Act on the ground that the Ld. AO has not conducted proper inquiry relating to computation of books profits u/s 115JB of the Act and tax payable thereon. Ld. Pr. CIT issued following show cause notice for initiating proceedings:

*Sub- Notice u/s 263 of the Income Tax Act, 1961-A.Y. 2007-08, show cause-Reg.*

*Please refer to the order u/s 143(3)/254 dated 28.11.2016, passed by ITO-3(3) Bhopal, for A.Y. 2007-08, whereby total income was assessed at Rs. Nil.*

*2. Perusal of the order u/s 143(3)/254 dated 28.11.2016, reveals that the income of the assessee was revised as per order u/s 254/143(3) dated 28.11.2016 at Rs. Nil after setting off loss of Rs.28,50,884/- under MAT provisions, such non assessment of book profit resulted into short levy of tax of Rs.3,19,800/-+ interest u/s 234B.*

*3. Assessment in the said case, 143(3)/254 dated 28.11.2016, was finalized without considering the above mentioned facts relating to MAT provisions. This omission on part of the AO, renders the order u/s 143(3)/254 dated 28.11.2016, for A.Y. 2007-08, erroneous as well as prejudicial to the interests of*

*revenue. Therefore, I propose to invoke powers vested u/s 263 of the Income Tax Act,1961 in respect of the order referred to above.*

11. From perusal of above notice we find that Ld. Pr. CIT has mentioned that the Ld. Assessing officer has not dealt with the issue of computation of books Profit u/s 115JB of the Act under MAT provisions due to which there was short levy of tax. Ld. Pr. CIT has invoked the provisions u/s 263 of the Act against the order of Ld. Assessing Officer framed u/s 143(3) r.w.s 254 of the Act dated 28.11.2016 which was framed on the specific directions by the Tribunal vide its order dated 05.10.2015.

12. Before invoking the power u/s 263 of the Act Ld. Pr. CIT/CIT has to come a conclusion that assessment order in question is erroneous insofar as it is prejudicial to the interest of revenue. For better understanding we will go through the provisions of the section 263 of the Act which reads as follows:

**263.** (1) *The Principal Commissioner or 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 interests 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.*

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

- (a) an order passed on or before or after the 1st day of June, 1988 by the Assessing Officer shall include—*
- (i) an order of assessment made by the Assistant Commissioner or Deputy Commissioner or the Income-tax Officer on the basis of the directions issued by the Joint Commissioner under [section 144A](#);*
  - (ii) an order made by the Joint Commissioner in exercise of the powers or in the performance of the functions of an Assessing Officer conferred on, or assigned to, him under the orders or directions issued by the Board or by the Principal Chief Commissioner or Chief Commissioner or Principal Director General or Director General or Principal Commissioner or Commissioner authorised by the Board in this behalf under [section 120](#);*
- (b) "record" shall include and shall be deemed always to have included all records relating to any proceeding under this Act available at the time of examination by the Principal Commissioner or Commissioner;*
- (c) where any order referred to in this sub-section and passed by the Assessing Officer had been the subject matter of any appeal filed on or before or after the 1st day of June, 1988, the powers of the Principal Commissioner or] Commissioner under this sub-section shall extend and shall be deemed always to have extended to such matters as had not been considered and decided in such appeal.*

*Explanation 2.—For the purposes of this section, it is hereby declared that an order passed by the Assessing Officer shall be deemed to be erroneous in so far as it is prejudicial to the interests of the revenue, if, in the opinion of the Principal Commissioner or Commissioner,—*

- (a) the order is passed without making inquiries or verification which should have been made;*

- (b) the order is passed allowing any relief without inquiring into the claim;*
- (c) the order has not been made in accordance with any order, direction or instruction issued by the Board under [section 119](#);*  
*or*
- (d) the order has not been passed in accordance with any decision which is prejudicial to the assessee, rendered by the jurisdictional High Court or Supreme Court in the case of the assessee or any other person.*

*(2) No order shall be made under sub-section (1) after the expiry of two years from the end of the financial year in which the order sought to be revised was passed.*

*(3) Notwithstanding anything contained in sub-section (2), an order in revision under this section may be passed at any time in the case of an order which has been passed in consequence of, or to give effect to, any finding or direction contained in an order of the Appellate Tribunal, National Tax Tribunal, the High Court or the Supreme Court.*

*Explanation.—In computing the period of limitation for the purposes of sub-section (2), the time taken in giving an opportunity to the assessee to be reheard under the proviso to [section 129](#) and any period during which any proceeding under this section is stayed by an order or injunction of any court shall be excluded.*

13. From perusal of the above provisions in our understanding, Ld. Pr. CIT has power to revise the assessment order u/s 263 of the Act but to invoke the power, twin conditions must be satisfied with (i) the order of the assessing officer should be erroneous (ii) It must be prejudicial to the interest of the revenue. Unless both these conditions are satisfied, the Pr. CIT cannot assume jurisdiction to revise the assessment order. It is not

necessary that every order which is erroneous may be prejudicial to the interest of the revenue or vice-versa. In some cases order passed by the Ld. AO may be erroneous but it may not be prejudicial to the interest of revenue or vice-versa. Therefore, unless the assessment order passed by the Ld. AO is erroneous as well as prejudicial to the interest of revenue Pr. CIT or CIT cannot assume jurisdiction to revise the assessment order.

14. In light of above observation we will first examine whether the order passed by the assessing officer u/s u/s 143(3)/254 is erroneous in nature. We find that the assessment order has been passed in pursuance to the specific direction given by the Tribunal restoring the issue of examining the genuineness of 5 sundry creditors observing as follows:

*“3. After hearing both the sides, we find that the learned CIT(A) has granted part relief to the assessee after considering the submissions and explanations made by the assessee. The revenue has failed to controvert the findings of the Learned CIT(A) in respect of 16 creditors which have been accepted by Learned CIT(A) as genuine, therefore we find no merit in the appeal of the revenue. However, in respect of five creditors which were held to be non-genuine, we hold that certain more facts need to be brought on record to decide the issue, therefore, after hearing both the sides, we restore this issue to the file of the Assessing Officer*

*to decide de novo. The assessee shall provide correct addresses of these five creditors and the Assessing Officer will verify whether these concerns are showing outstanding in their books of accounts against the assessee. Whether the creditors are genuine or not. After considering all these, assessing officer shall decide the issue as per law.*

15. We observe that Hon'ble High Court of Gujarat in the case of Garden Silk Mills Ltd. vs. CIT 221 ITR 861 gave following observations which to some extent are connected to the instant appeal:

*“We are of the view that merely because the Department is contemplating to file a special leave petition, the Commissioner cannot refuse to follow the decision when the court has settled the law in question. It may happen that the decision of an appellate authority or the Tribunal pertaining to an earlier assessment year on a particular point is in favour of the assessee and that is followed in the assessment relating to the subsequent assessment years. It may happen that the Commissioner may consider that such a decision of the appellate authority or the Tribunal is not in accordance with law and may also find that such a decision is the subject-matter of further appeal or revision as the case may be. He may expect that the higher court or authority may decide in favour of the Revenue, but that may take a number of years. He may be of the view that by the time of decision of the higher court or authority arrives, a number of years may elapse by which time the exercise of the power under [section 263](#) may become barred. When an Assessing Officer has passed an order on the basis of the law laid down by the court, can it be said that the Assessing Officer's order is erroneous ? We are of the view that exercising of the power to review in such a situation is not in accordance with law for the simple reason that the order of the assessing authority cannot be said to be erroneous as he has*

*rendered the decision following the decision of a higher authority or a court on the same point. It is required to be note that the decisions reached by the Tribunal or the High Court are binding upon the Assessing Officer and discipline demands that he should follow the decision of the Tribunal or the High Court, as the case may be. It is not open for him to ignore the same on the ground that the Tribunal's or the High Court's ruling on the question is the subject-matter of revision or appeal before the higher forum. If he is permitted to take such a view, it would introduce nothing but judicial indiscipline, which is not called for. It would lead to a chaotic situation. The grievance of the Revenue may be real and substantial in certain cases but such situation cannot be provided for by judicial interpretation by courts but only by an appropriate agency ([Russell Properties Pvt. Ltd. v. Addl. CIT \[1977\] 109 ITR 229 \(Cal\)](#) and [K. N. Agrawal v. CIT \[1991\] 189 ITR 769 \(All\)](#)).*

16. Examining facts of the instant appeal, in the light of the above judgment of Hon'ble High Court of Gujarat we observe that the assessing officer was bound to follow the direction given by the Tribunal and it was not open for him to ignore the same and further he was also not permitted to deal with any other issue other than the direction given by the Tribunal as it would have resulted in judicial indiscipline. We find that the Ld. AO has duly adhered the direction of the Tribunal and tested the genuineness of the five sundry creditors and confirming addition for unexplained four creditors totalling to Rs.10,19,818/- holding them to non-genuine We can therefore, safely conclude that the order framed by the assessing officer u/s

143(3) r.w.s 254 of the Act is not erroneous, and thus one of the twin conditions is not fulfilled.

17. We, therefore, in the given facts and circumstances of the case, are of the considered view that Pr. CIT exceeded the jurisdiction by invoking the powers u/s 263 of the Act and is therefore, liable to be quashed. However, the action of Pr. CIT taken u/s 263 of the Act may had found some merit in case if it has been invoked against the order u/s 143(3) of the Act dated 31.12.2009 and if the order u/s 263 of the Act had been framed on or before 31.03.2012 as provided u/s 263(2) of the Act.

18. In the result the impugned order u/s 263 of the Act dated 31.07.2018 stands quashed and the assessment order u/s 143(3) r.w.s 254 of the Act dated 24.11.2016 is restored.

19. In the result, appeal of the assessee stands allowed.

*Order was pronounced in the open court on 13.06.2019.*

Sd/-  
(KUL BHARAT)  
JUDICIAL MEMBER

Sd/-  
(MANISH BORAD)  
ACCOUNTANT MEMBER

Indore; दिनांक Dated : 13/06/2019

*Patel, P.S./नि.स.*

Copy to: Assessee/AO/Pr. CIT/ CIT (A)/ITAT (DR)/Guard  
file.

By order  
**Assistant Registrar**