

IN THE INCOME TAX APPELLATE TRIBUNAL
"B" BENCH : BANGALORE

BEFORE SHRI N.V VASUDEVAN, VICE PRESIDNET AND
SHRI B.R BASKARAN, ACCOUNTANT MEMBER

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| ITA No.935/Bang/2016 |
| Assessment year : 2011-12 |

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| Smt. Malini Subramanian, 965, Mahalakshmi, JLB Road, Mysuru-570 004. PAN – AXMPS 5082 K | Vs. | The Principal Commissioner of Income- tax, Mysuru. |
| APPELLANT | | RESPONDENT |

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| Appellant by | : | Shri Shreehari Kutsa, C.A |
| Respondent by | : | Ms. Neera Malhotra, CIT (DR) |

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| Date of hearing | : | 26.09.2019 |
| Date of Pronouncement | : | 27.09.2019 |

ORDER

Per B.R Baskaran, Accountant Member

The assessee has filed this appeal challenging the revision order dated 24.03.2016 passed by Ld Pr. CIT, Mysuru u/s 263 of the Act for assessment year 2011-12. The assessee is aggrieved by the revision order passed in respect of expenditure claimed as "good will".

2. We heard the parties and perused the record. The assessment in the hands of the assessee for the year under

consideration was completed by the assessing officer u/s 143(3) of the Act on 28-03-2014. The Ld Pr. CIT, upon examination of record, took the view that the assessment order passed by the AO is erroneous and prejudicial to the interests of revenue. Accordingly, he revised the assessment order on the following issues:-

- (a) Claim for deduction of expenditure claimed as "Good will".
- (b) Disallowance u/s 43B of the Act in respect of unpaid duties and taxes.
- (c) Interest income accrued on deposits.

The assessee is aggrieved by the revision order passed in respect of claim of Good will amount.

3. The Ld A.R submitted that the assessee is a dealer in Tupperware products in part of Mysore area. The assessee was allotted one more area by carving out from the area of some another distributor. Accordingly a tripartite agreement was entered between the assessee, the Principal and outgoing distributor. As per the said agreement, the assessee was liable to pay a sum of Rs.14,01,107/- as "good will" to the outgoing distributor, which shall be paid over a period of three years as a % of the sales of every month. Accordingly the assessee paid a sum of Rs.1,41,107/- to the outgoing distributor during the year under consideration and claimed the same as deduction. The Ld A.R submitted that the assessee has only expanded the existing business and no "good will" was, in fact, acquired. He submitted that the compensation payable to the outgoing distributor was referred under the nomenclature "good will" and the same is paid in the course of carrying on the existing business of the assessee. Accordingly he

submitted that the above said claim is allowable. He further submitted that, if the view of the Ld CIT(A) is upheld for a moment, then the assessee would be entitled to depreciation on the gross amount of Good will of Rs.14.01 lakhs, in which case, the total income computed by the AO would go down, since the amount of admissible depreciation would be more than the claim of Rs.1,41,107/-. Accordingly he submitted that, in view of the above said aspect, the assessment order cannot be considered as prejudicial to the interests of revenue.

4. On the contrary, the Ld D.R submitted that the AO did not examine this issue at all during the course of assessment proceedings and hence the same constitute mistake apparent from record. Since the Good Will amount is capital expenditure, the same cannot be allowed as deduction. The Ld CIT-DR further submitted that the Ld Pr. CIT has only directed the AO to examine the claim in accordance with the law. Accordingly Ld CIT-DR submitted that the revision order passed by Ld Pr. CIT on the above said issue cannot be found fault with.

5. We heard the rival contentions and perused the record. Before going into the merits of the issue, we would like to discuss about the legal position with regard to the power of Learned CIT to invoke revision proceedings under section 263 of the Act. The scope of revision proceedings initiated under section 263 of the Act was considered by Hon'ble Bombay High Court, in the case of Grasim Industries Ltd. V CIT (321 ITR 92) by taking into account the law laid down by the Hon'ble Supreme Court in the case of

Malabar Industrial Co Ltd (243 ITR 80). The relevant observations made by Hon'ble Bombay High Court are extracted below:

“Section 263 of the Income-tax Act, 1961 empowers the Commissioner to call for and examine the record of any proceedings under the 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, to pass an order upon hearing the assessee and after an enquiry as is necessary, enhancing or modifying the assessment or cancelling the assessment and directing a fresh assessment. The key words that are used by section 263 are that the order must be considered by the Commissioner to be “erroneous in so far as it is prejudicial to the interests of the Revenue”. This provision has been interpreted by the Supreme Court in several judgments to which it is now necessary to turn. In *Malabar Industrial Co. Ltd. v. CIT* [2000] 243 ITR 83, the Supreme Court held that the provision “cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer” and “it is only when an order is erroneous that the section will be attracted”. The Supreme Court held that an incorrect assumption of fact or an incorrect application of law, will satisfy the requirement of the order being erroneous. **An order passed in violation of the principles of natural justice or without application of mind, would be an order falling in that category.** The expression “prejudicial to the interests of the Revenue”, the Supreme Court held, it is of wide import and is not confined to a loss of tax. What is prejudicial to the interest of the Revenue is explained in the judgment of the Supreme Court (headnote) :

“The phrase ‘prejudicial to the interests 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.”

The principle which has been laid down in Malabar Industrial Co. Ltd. [2000] 243 ITR 83 (SC) has been followed and explained in a subsequent judgment of the Supreme Court in CIT v. Max India Ltd. [2007] 295 ITR 282.”

6. The Hon’ble Supreme Court has held that the existence of twin conditions, viz., the assessment order should be erroneous and it should be prejudicial to the interests of revenue, should be shown in the revision order passed u/s 263 of the Act. The Hon’ble Apex Court has further held that non-application of mind on the part of the Income-tax Officer would make the assessment order erroneous. In the instant case, we notice that the assessing officer did not conduct any enquiry at all with regard to the claim of “Good Will” made by the assessee. The Ld A.R also could not demonstrate that the AO did conduct enquiry and has taken a possible view.

7. Hence, we are of the view that the AO has passed the order without making any enquiry on this issue and the same would render the order erroneous and in view of its tax implications, the same would cause prejudice to the interests of revenue. With regard to the contention of the assessee that the assessment order cannot be considered to be prejudicial to the interests of revenue on account of the eligibility of the

assessee to claim depreciation on the Good Will amount, we are of the view that the said claim does not arise out of the assessment order and hence the same cannot be considered.

8. In view of the foregoing discussions, we are of the view that there is no infirmity in the revision order passed by Ld Pr. CIT. Accordingly we uphold the same.

9. In the result, the appeal filed by the assessee is dismissed.

Order pronounced in the Open Court on **27th September, 2019.**

Sd/-
(N.V Vasudevan)
Vice President

Sd/-
(B.R Baskaran)
Accountant Member

Bangalore,
Dated, 27th September, 2019.

/ vms /

Copy to:

1. The Applicant
2. The Respondent
3. The CIT
4. The CIT(A)
5. The DR, ITAT, Bangalore.
6. Guard file

By order

Asst. Registrar, ITAT, Bangalore.

1. Date of Dictation
2. Date on which the typed draft is placed before the dictating Member
3. Date on which the approved draft comes to Sr.P.S
4. Date on which the fair order is placed before the dictating Member
5. Date on which the fair order comes back to the Sr. P.S.
6. Date of uploading the order on website.....
7. If not uploaded, furnish the reason for doing so
8. Date on which the file goes to the Bench Clerk
9. Date on which order goes for Xerox & endorsement.....
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11. The date on which the file goes to the Assistant Registrar for signature on the order
12. The date on which the file goes to dispatch section for dispatch of the Tribunal Order
13. Date of Despatch of Order.