

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.257/Ind/2018
Assessment Year: 2013-14**

M/s. Gupta Sons 46, Ramlaxmi Parisar 142, Malviyanagar Bhopal (Appellant)	बनाम/ Vs.	Pr. CIT-1 Bhopal (Revenue)
P.A. No.AAEFG8044L		

Appellant by	Written submission (NONE)
Respondent by	Smt. Ashima Gupta, DR
Date of Hearing:	10.10.2019
Date of Pronouncement:	11.10.2019

आदेश / O R D E R

PER KUL BHARAT, J.M:

This appeal by the assessee is directed against order of the Ld. Pr. CIT-1, Bhopal dated 2.2.2018 pertaining to the assessment year 2013-14. The assessee has raised following grounds of appeal:

1. *That the impugned order passed u/s 263 of the Act by Pr. CIT is bad in law and deserves to be cancelled.*
2. *That the Ld. Pr. CIT erred in holding that the order of assessment passed by A.O. was erroneous in so far as it was prejudicial to the interest of revenue.*

2. The only effective ground in this appeal is against revising the assessment order by invoking provisions of section 263 of the Income Tax Act, 1961 (hereinafter called as 'the Act'). The facts giving rise to the present appeal are that the assessee firm is engaged in the business of jewellery, ornaments, precious stones, etc. The assessment u/s 143(3) of the Act was framed vide order dated 3.3.2016. Subsequently, Ld. Pr. CIT on going through the case records noticed that the assessee had commissioned and installed solar power generation system on 26.3.2013. The cost of fresh project including land was Rs.9,77,72,500/- and claimed depreciation @ 40%. It was noticed that the invoice bill of solar plant from M/s. MNB Switchgear was dated 30.3.2013 that goes to show that

plant was purchased after installation and it was being used in the business by the assessee. Therefore, Ld. Pr. CIT by invoking the provisions of section 263 of the Act issued a notice on 27.12.2017 to the assessee calling upon as to why the assessment order should not be revised. In response thereto, the assessee filed written submission. The Ld. Pr. CIT was not satisfied with the explanation offered by the assessee. Therefore, he set aside the assessment order and directed the A.O. to reframe the assessment.

3. At the time of hearing, no one appeared on behalf of the assessee. It is noticed that the assessee had sought adjournment on last day of hearing and also on 10.5.2019. The assessee was aware of the date of hearing. We find that the assessee has filed a written submission received in the registry on 1.8.2019. Neither any person representing the assessee appeared nor has any request seeking

adjournment been filed. Therefore, the appeal is taken up in the absence of the assessee and to be decided on the basis of material available on record. Assessee filed written submission, which is reproduced as under:

1. At the outset it is denied that the A.O. has erred in allowing claim of depreciation of solar power generators which have been purchased and installed and used for the purpose of business during the financial year 2012-13 that the order passed by the A.O. can be considered as erroneous in so far as it is prejudicial to the interest of revenue. The deduction has been allowed by the A.O. after properly examining facts of the case,. To reach to a finding that the order passed by the Assessing Officer is erroneous and prejudicial to the interests of revenue within the meaning of section 263 of the Act twin conditions need to be satisfied for invoking such a power u/s 263, which are: (a) the order of the Assessing Officer sought to be revised is erroneous; and (b) it is prejudicial to the interests of the revenue. The provisions of section 263 cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer. The order of the Assessing Officer cannot be termed prejudicial simply because the Assessing 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 Assessing Officer has taken one view with which the Commissioner did not agree. It is only when an order is erroneous that the section will be attracted and an incorrect assumption of fact or an incorrect application of law will satisfy the requirement of the order being erroneous. Where two views are possible and the Assessing Officer has taken one view and the Commissioner does not agree with the view taken by the Assessing Officer, the assessment order cannot be treated as an order erroneous or prejudicial to the interest of Revenue. It is not mere prejudice to the

Revenue, or a mere erroneous view which can be revised, under section 263 of the Income-tax Act,1961 . There should be the added element of “unsustainability” in the order of the Assessing Officer to invoke jurisdiction u/s 263 of the Act. Reliance is placed on the decision of jurisdictional High Court and other High Courts decisions as under:-

- (i) 395 ITR 138(M.P.) CIT Vs. Narottam Mishra (M.P.) 395 ITR 138(M.P.)
- (ii) 400 ITR 530(HP)- Virbhadra Singh (HUF) Vs. PCIT
- (iii) 402 ITR 117 (Raj)- Laxmi Narayan Vs. CIT
- (iv) 412 ITR 237(Guj)- Aryan Arcade Ltd Vs. PCIT

2. The assessee has been allowed depreciation of Rs 3,91,09,000/- in the computation of income on Solar Power Generators in accordance with provisions of section 32(1)(ii) of the Act. The assessee has purchased these generators during F.Y. 2012-13 , installed these generators in F.Y. 2012-13 and put these generators for business use in F.Y. 2012-13. The assessee has also made payments for acquiring these generators during the year itself and only a sum of Rs.59,48,030/- remain payable as on 31-03-2013. The assessee has satisfied all the conditions which were necessary to claim depreciation of these Solar Power Generators. The A.O. has examined all the documents filed on record and allowed the claim of depreciation which was perfectly in order.

4. The Ld. D.R. opposed these submissions and supported the impugned order. Ld. CIT(DR) argued that there is no illegality in the order of the Ld. Pr. CIT. Ld. CIT(DR) submitted that the assessing officer failed to

examine this aspect and mechanically allowed the claim of depreciation.

5. We have considered the rival submissions, perused the materials on record. The Ld. Pr. CIT has decided the issue as under:

I have gone through the assessment records and submissions made on behalf of assessee which are placed on records after examination. It is noticed that the invoice bill of the aforesaid solar power plant was issued on 30.03.2013 whereas the assessee has claimed commissioning and installation of the said plant on 26.03.2013. The assessee has failed to justify the irregularity in between the dates as to how the installation and commissioning could be possible before the date of invoice 30.03.2013. He has also failed to show that the said plant was, infact, installed and commissioned in the previous itself. As such the assessee's submission are noticed to be not satisfactory and are found to be devoid of the merits. However, the submission of the assessee need to be further examined and verified. The AO is expected to make further examination/verification of the facts. Hence, it is held that the assessment order passed by the AO is erroneous and prejudicial to the interest of the revenue. This view also gets support from the following cases:-

- a) *Ram Pyari Devi Saraogivs CIT (1968) 67 ITR 84 (SC)* wherein Hon'ble Supreme Court has held that assessment made in undue haste and without making inquiries which are called for in the circumstances of the case is erroneous and prejudicial to the interest of revenue.
- (b) In the case of *CIT vs Seshasayee Paper & Boards Ltd (2000) 242 ITR 0490(Mad)* Hon'ble High Court has held as under:-

The powers of the Commissioner are very wide in exercising the powers of revision under section 263. The only limitation on his power is that he must have some materials which would enable him to form a prima facie opinion that the order passed by the Assessing Officer is erroneous insofar as it is prejudicial to the interests of the revenue. Once he comes to the conclusion on the basis of the material that the order of the Assessing Officer is erroneous and prejudicial to the interests of the revenue, the Commissioner is empowered to pass an order as the circumstances of the case may warrant. He may pass an order enhancing the assessment or he may modify the assessment. He is also empowered to cancel the assessment and direct a fresh assessment. The Commissioner is fully empowered to adopt any one of the three courses indicated by the provisions of section 263 and the Commissioner's powers cannot be faulted because he has cancelled the assessment and has directed a fresh assessment. In the instant case, the order of the Commissioner showed that he had gone through the records of the Assessing Officer and he considered the order to be erroneous and prejudicial to the interests of the revenue on several matters for both the assessment years. The Commissioner also found that the records did not show that the Assessing Officer had considered the points on which the revision was made while completing the assessment. He also gave detailed reasons with reference to some of the items for both the assessment years and he held that they were representatives of the various issues covered in the show-cause notices. On the above basis, the Commissioner came to the conclusion that the order of the Assessing Officer was erroneous and prejudicial to the interests of the revenue and set aside the orders of the Assessing Officer, with the direction to the Assessing Officer to consider the points in detail. It was not a case where he simply set aside the assessment order to verify the correctness of the accounts seeking clarification from the assessee.

The Tribunal was, thus, not correct in holding that the order passed by the Commissioner was not a speaking order.

For making a valid order under section 263, it is essential for the Commissioner to record an express finding that the order sought to be revised is erroneous as well as prejudicial to the interests of the revenue. In the instant case, the Commissioner had recorded such a finding and with reference to some of the items, he positively found that the orders were erroneous and prejudicial to the interests of the revenue. But there was nothing in section 263 to show that the Commissioner should in all cases record his final conclusion on the points in controversy before him. Moreover, the Commissioner found that the Assessing Officer was not correct in granting relief qua some of the items considered in the original assessment proceedings and from the instances or specimen of some of the cases examined by him, he came to the conclusion that the Assessing Officer had not completed the assessment by following the procedure expected of him. It was not necessary for the Commissioner to examine each item in detail and record a clear finding that the order passed by the Assessing Officer was erroneous and not in accordance with law. Some of the typical illustrations were noticed by the Commissioner to find out how the assessment proceedings were proceeded with by the officer and how the orders were erroneous and prejudicial to the interests of the revenue. Therefore, it was not a case of the Commissioner directing fresh assessment without any material. The order of the Commissioner clearly showed that he had enough materials and on that basis he exercised the powers of revision under section 263, set aside the order and ordered to make fresh assessment. The Assessing Officer is expected to make an enquiry before taxing the particular item of income or before granting deduction of particular item of expenditure and if he does not make such an enquiry as expected, that would be a ground for the Commissioner to interfere under section 263.

The mere fact that a higher authority like the IAC was associated with the draft assessment proceedings would not render the orders of assessment immune from the revisional proceedings. The Commissioner is expected to examine the orders of assessment to find out whether there is any error resulting in prejudice to the interests of the revenue and in that process, the question as to who participated in the assessment proceedings or made the order of assessment is an immaterial consideration.

The Commissioner occupies a unique position in the administrative set-up of the department. He is the head of the department in the administrative side and he is also given the power of quasi-judicial nature under section 263 to exercise the powers of revision.

There is no right of appeal to the department against the orders of the assessing authority, to the first appellate authority, and jurisdiction to reopen or to rectify the mistake is subject to the fulfilment of statutory conditions to reopen the assessment or to rectify the mistake in the order. The internal audit party on going through the records of the assessment of the assessee had pointed out certain mistakes in the orders passed by the Assessing Officer. The report of the audit does not in any way bind the Commissioner but nonetheless, the Commissioner is empowered under section 263 to make such enquiry and if after such investigation, the Commissioner comes to the conclusion

... if the order is erroneous and prejudicial to the interests of the revenue, he can pass any order as he thinks fit, but where the materials are already available on record, there is nothing which precludes the Commissioner from taking into consideration already available materials on record.

The report of the internal audit party does not have any binding effect on the Commissioner and the order passed by the Commissioner showed that he had applied his mind independently to the errors pointed out by the internal audit party and then came to the conclusion that the orders passed by the Assessing Officer were erroneous and prejudicial to the interests of the revenue. Therefore, it was not a case of the action initiated by the Commissioner on the binding circular issued by the higher authorities nor was it a case of surrender of jurisdiction in favour of any other authority, but it was a case where the Commissioner had exercised the powers of revision after applying his mind in considering the question whether the orders were erroneous and prejudicial to the interests of the revenue, in the revisional proceedings. Consequently, the Commissioner had exercised the powers and assumed the jurisdiction properly and the Tribunal was not correct in holding that the Commissioner lacked the jurisdiction under section 263.

- (c) *CIT vs Bhagwan Das (2005) 272 ITR 367 (All.)* wherein Hon'ble High Court has held that non-application of mind by the Assessing Officer was prejudicial to the interest of the revenue.
- (d) *Pratap Footwear vs ACIT(2003) SOT 638 (Jabalpur) (Trib.)* wherein Hon'ble Tribunal has held that non-application of mind by the Assessing Officer was prejudicial to the interest of revenue.

It is a settled law that if the Assessing Officer fails to make proper enquiry, the assessment order passed by him is erroneous and prejudicial to the interest of revenue. Further, Explanation 2 of section 263(1) of the Income Tax Act, 1961 (inserted by the Finance Act, 2015 w.e.f. 01.06.2015 reads as under:-

“For the purposes of this, 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 interest of 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;*

After careful examination of the facts placed on record and the legal position as above, I am of the view that the Assessing Officer did not examine the facts of the case properly as it was required from him.

In view of the above facts, the assessment order passed by the Assessing Officer is erroneous in so far as it is prejudicial to the interests of revenue and is hereby cancelled. The Assessing Officer is directed to reframe the assessment after examining the issues mentioned above in view of the discussion in the preceding paragraphs and after affording sufficient opportunity of being heard to the assessee. 1)

6. The contention of the assessee is that the A.O. has adopted one of the plausible view. It is stated that the solar generators were purchased during the financial year

2012-13 and also installed during the financial year 2012-13. It is also stated that these generators were put to use for business in the financial year 2012-13 itself. It is further stated that the assessee has made payment of the sale consideration within the financial year 2012-13 except a sum of Rs.59,48,030/- which was paid on 31.3.2013. The assessee has not filed any evidence supporting this claim before us. In the absence of the requisite evidence in support of the claim that the solar generators were purchased, installed, put to use for business and the part payment of the same was also paid during the financial year 2012-13. We do not see any reason to interfere with the finding of the Ld. Pr. CIT. Ground raised in the appeal is dismissed.

7. In the result, the appeal filed by the assessee in ITA No.257/Ind/2018 for the A.Y. 2013-14 is dismissed.

Order was pronounced in the open court on 11.10.2019.

Sd/-
(MANISH BORAD)
ACCOUNTANT MEMBER

Sd/-
(KUL BHARAT)
JUDICIALMEMBER

Indore; दिनांक Dated : 11/10/2019
VG/SPS

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

By order

Assistant Registrar, Indore