



ITA No.1941/Mum/2018
Blue Star Ltd
Assessment Year :2013-14

**आयकर अपीलिय अधिकरण “बी” न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL
“B” BENCH, MUMBAI**

**माननीय श्री महावीर सिंह, न्यायिक सदस्य एवं
माननीय श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष।
BEFORE HON’BLE SHRI MAHAVIR SINGH, JM AND
HON’BLE SHRI MANOJ KUMAR AGGARWAL, AM**

आयकर अपील सं./ I.T.A. No.1941/Mum/2018
(निर्धारण वर्ष / Assessment Year:2013-14)

Blue Star Ltd. Kasturi Building Mohan T. Advani Chowk Jamshedji Tata Road Mumbai – 400 020	बनाम/ Vs.	Pr.CIT-1, 3 rd Floor, Room No. 387, Aaykar Bhavan M.K Road, Mumbai.
स्थायी लेखासं./जीआइआरसं./PAN/GIR No. AAACB-4487-D		
(पीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

Assessee by	:	Shri Niraj Sheth – Ld. AR
Revenue by	:	Shri N.S. Jangpangi – Ld. DR

सुनवाई की तारीख/ Date of Hearing	:	08/08/2019
घोषणा की तारीख / Date of Pronouncement	:	24/10/2019

आदेश / ORDER

Manoj Kumar Aggarwal (Accountant Member): -

1.1 As per the provisions of Section 263 of Income Tax Act, 1961, the revenue authorities namely Pr. Commissioner of Income Tax / Commissioner of Income Tax is vested with the supervisory powers of suo-moto revision of any order passed by the Assessing Officer [AO]. For the said purpose, the appropriate authority may call for and examine the record of any proceedings under the Act and may proceed to revise



the same provided two conditions are satisfied-(i) the order of the assessing officer sought to be revised is erroneous; and (ii) it is prejudicial to the interest of the revenue. If one of the condition is absent i.e. if the order of the Income-tax Officer is erroneous but is not prejudicial to the revenue or if it is not erroneous but it is prejudicial to the revenue - recourse cannot be had to Section 263 of the Act as held by Hon'ble Supreme Court in **Malabar Industrial Co. Ltd. V/s CIT [243 ITR 83 10/02/2000]** & noted by Hon'ble Delhi High Court in **CIT V/s Vikas Polymers [194 Taxman 57 16/08/2010]**. The Hon'ble Supreme Court in **Malabar Industrial Co. Ltd. V/s CIT (supra)** has held that 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 said principal has been reiterated by Hon'ble Court in its subsequent judgement titled as **CIT V/s Max India Ltd. (295 ITR 282)**. Similar principal has been followed by jurisdictional High Court in **Grasim Industries Ltd. V/s CIT (321 ITR 92)**.

1.2 The Hon'ble Delhi High Court, **CIT V/s Vikas Polymers (supra)**, further observed that as regards the scope and ambit of the expression



"erroneous", Hon'ble Bombay High Court in **CIT vs. Gabriel India Ltd. [1993 203 ITR 108 (Bombay)]**, held with reference to Black's Law Dictionary that an "erroneous judgment" means "one rendered according to course and practice of Court, but contrary to law, upon mistaken view of law; or upon erroneous application of legal principles" and thus it is clear that an order cannot be termed as "erroneous" unless it is not in accordance with law. If an Income-tax Officer acting in accordance with law makes a certain assessment, the same cannot be branded as "erroneous" by the Commissioner simply because, according to him, the order should have been written differently or more elaborately. The Section does not visualize the substitution of the judgment of the Commissioner for that of the Income-tax Officer, who passed the order unless the decision is not in accordance with law.

1.3 Further, any and every erroneous order cannot be the subject matter of revision because the second requirement also must be fulfilled. There must be material on record to show that tax which was lawfully eligible has not been imposed as held in **Gabriel India Ltd.** However, the expression "prejudicial to the interest of the revenue", as held by the Supreme Court in the **Malabar Industrial Co. Ltd.'s** case, is not an expression of art and is not defined in the Act and, therefore, must be understood in its ordinary meaning. It is of wide import and is not confined to the loss of tax as held in various judicial pronouncements. At the same time, the words "prejudicial to the interest of the revenue", as observed in *Dawjee Dadabhoy and Co. vs. S.P. Jain*, (1957) 311 ITR 872 (Calcutta), can only mean that "the orders of assessment challenged are such as are not in accordance with law, in consequence whereof the



lawful revenue due to the State has not been realized or cannot be realized." Thus, the Commissioner's exercise of revisional jurisdiction under the provisions of Section 263 cannot be based on whims or caprice. It is trite law that it is a quasi-judicial power hedged in with limitation and not an unbridled and unchartered arbitrary power. The exercise of the power is limited to cases where the Commissioner on examining the records comes to the conclusion that the earlier finding of the Income-tax Officer was erroneous and prejudicial to the interest of the revenue and that fresh determination of the case is warranted. There must be material to justify the Commissioner's finding that the order of the assessment was erroneous insofar as it was prejudicial to the interest of the revenue.

1.4 The Hon'ble Delhi Court, in the cited decision, further observed that there is a fine though subtle distinction between "lack of inquiry" and "inadequate inquiry". It is only in cases of "lack of inquiry" that the Commissioner is empowered to exercise his revisional powers by calling for and examining the records of any proceedings under the Act and passing orders thereon. In *Gabriel India Ltd. (supra)*, it was expressly observed: -

"The Commissioner cannot initiate proceedings with a view to starting fishing and roving enquiries in matters or orders which are already concluded. Such action will be against the well-accepted policy of law that there must be a point of finality in all legal proceedings, that stale issues should not be reactivated beyond a particular stage and that lapse of time must induce repose in and set at rest judicial and quasi-judicial controversies as it must in other spheres of human activity [Parashuram Pottery Works Co. Ltd. vs. ITO, (1977) 106 ITR 1 (SC)].

It was further observed as under: -



"From the aforesaid definitions as it is clear that an order cannot be termed as erroneous unless it is not in accordance with law. If an Income-tax Officer acting in accordance with law makes a certain assessment, the same cannot be branded as erroneous by the Commissioner simply because, according to him, the order should have been written more elaborately. This section does not visualize a case of substitution of the judgment of the Commissioner for that of the Income-tax Officer, who passed the order unless the decision is held to be erroneous. Cases may be visualized where the Income-tax Officer while making an assessment examines the accounts, makes enquiries, applies his mind to the facts and circumstances of the case and determines the income either by accepting the accounts or by making some estimate himself. The Commissioner, on perusal of the records, may be of the opinion that the estimate made by the officer concerned was on the lower side and left to the commissioner he would have estimated the income at a figure higher than the one determined by the Income-tax Officer. That would not vest the Commissioner with power to re-examine the accounts and determine the income himself at a higher figure. It is because the Income-tax Officer has exercised the quasi-judicial power vested in him in accordance with law and arrived at conclusion and such a conclusion cannot be termed to be erroneous simply because the Commissioner does not feel satisfied with the conclusion.

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There must be some prima facie material on record to show that tax which was lawfully exigible has not been imposed or that by the application of the relevant statute on an incorrect or incomplete interpretation a lesser tax than what was just has been imposed.

1.5 The Hon'ble Supreme Court in **CIT V/s Amitabh Bachchan (69 Taxmann.com 170 11/05/2016)** held that the power of appeal and revision is contained in Chapter XX of the Act which includes section 263 that confers *suo motu* power of revision in the Commissioner. The different shades of power conferred on different authorities under the Act has to be exercised within the areas specifically delineated by the Act and the exercise of power under one provision cannot trench upon the powers available under another provision of the Act. In this regard, it must be specifically noticed that against an order of assessment, so far as the revenue is concerned, the power conferred under the Act is to reopen the concluded assessment under section 147 and/or to revise the assessment order under section 263. The scope of the power/jurisdiction



under the different provisions of the Act would naturally be different. The power and jurisdiction of the revenue to deal with a concluded assessment, therefore, must be understood in the context of the provisions of the relevant sections. While doing so, it must also be borne in mind that the legislature had not vested in the revenue any specific power to question an order of assessment by means of an appeal. Regarding applicability of Section 263, what has to be seen is that a satisfaction that an order passed by the Authority under the Act is erroneous and prejudicial to the interest of the revenue is the basic precondition for exercise of jurisdiction under section 263. Both are twin conditions that have to be conjointly present. Once such satisfaction is reached, jurisdiction to exercise the power would be available subject to observance of the principles of natural justice which is implicit in the requirement cast by the section to give the assessee an opportunity of being heard. Further, there could be no doubt that so long as the view taken by the Assessing Officer is a possible view, the same ought not to be interfered with by the Commissioner under Section 263 merely on the ground that there is another possible view of the matter. Permitting exercise of revisional power in a situation where two views are possible would really amount to conferring some kind of an appellate power in the revisional authority. This is a course of action that must be desisted from.

1.6 The Hon'ble Bombay High Court **Moil Ltd. Vs. CIT [81 Taxmann.com 420]** observed that if a query is raised during the assessment proceedings and if the query is responded by the assessee, the mere fact that the query was not dealt with in the assessment order then it would not lead to a conclusion that no mind has been applied to it



and the Assessing Officer is not expected to raise more queries, if he was satisfied about the admissibility of claim on the basis of the material and the details supplied.

1.7 An Explanation-2 has been inserted by Finance Act 2015 in Section 263 with effect from 01/06/2015 to declare that order shall be deemed to be erroneous in so far as it is prejudicial to the interest of the revenue, if in the opinion of appropriate authority-(1) the order was passed without making inquiries or verifications which should have been made; (ii) the order is passed allowing any relief without inquiring into the claim; (iii) the order is not in accordance with any direction or instructions etc. issued by the Board u/s 119; or (iv) the order was not in accordance with binding judicial precedent.

2.1 Keeping in mind aforesaid principle, we find that the assessee before us, is under appeal challenging the validity of revisional jurisdiction exercised by Ld. Pr. Commissioner of Income Tax-1, Mumbai for Assessment Year 2013-14 vide order dated 02/02/2018. The grounds raised by the assessee read as under: -

1.0 That on the facts and in the circumstances of the case, the impugned order passed u/s 263 is grossly arbitrary and bad in law in relation to the issues raised and adjudicated therein and needs to be summarily deleted.

1.1 That on the facts and in the circumstances of the case, the Learned Principal Commissioner of Income Tax - I, Mumbai (here-in-after referred to as 'Ld. Pr. CIT) was not justified and grossly erred in initiating proceedings u/s 263 of the Income Tax Act, 1961 (here-in-after referred to as the 'Act') without appreciating the fact that the order passed by the Assessing Officer (here-in-after referred to as 'Ld. A.O/) was neither erroneous nor prejudicial to interests of the Revenue and therefore the proceedings are bad in law.

1.2 That on the facts and in the circumstances of the case, the assessment u/s 143(3) having been made in accordance with law and after due consideration of the relevant facts through proper application of mind in relation to the issues mentioned



in the order u/s 263, the proceedings are void ab initio and the order is to be set aside in full.

1.3 That on the facts and in the circumstances of the case, the Ld. Pr. CIT was not justified in setting aside the assessment order passed by the Ld. A.O. and in directing the Ld. A.O. to do de novo assessment.

2.0 That on the facts and in the circumstances of the case and without prejudice to Ground No. 1.0 to 1.3 taken here-in-above, the Ld. Pr. CIT was not justified and grossly erred in directing that disallowance u/s 14A r.w.r 8D made under normal provisions by Ld. A.O. should also be made while computing Book profit u/s 115JB without appreciating the fact that disallowance in respect of expenditure incurred for earning exempt income in computing book profit u/s 115JB cannot be made by invoking Sec. 14A r.w.r 8D.

2.1 That on the facts and in the circumstances of the case and without prejudice to Ground No. 1.0 to 1.3 and Ground No. 2.0 taken here-in-above, the Ld. Pr. CIT was not justified and grossly erred in directing that disallowance u/s 14A r.w.r 8D be made while computing book profit u/s 115JB of the Act without appreciating the fact that no expenditure has been incurred for earning exempt income.

2.2 That on the facts and in the circumstances of the case and without prejudice to Ground No. 1.0 to 1.3 and Ground 2.0 to 2.1 taken here-in-above, the Ld. Pr. CIT was not justified and grossly erred in directing that disallowance u/s 14A r.w.r 8D made under normal provisions by Ld. A.O. in the order u/s 143(3) should also be made while computing Book profit u/s 115JB without appreciating the fact that said disallowance is erroneous as the same has been computed by including investment in foreign company, dividend from which is taxable.

2.3 That on the facts and in the circumstances of the case and without prejudice to Ground No. 1.0 to 1.3 and Ground 2.0 to 2.1 taken here-in-above, the Ld. Pr. CIT was not justified and grossly erred in directing that disallowance u/s 14A r.w.r 8D made under normal provisions by Ld. A.O. in the order u/s 143(3) should also be made while computing Book profit u/s 115JB without appreciating the fact that said disallowance is erroneous as the same has been computed by including investment in subsidiary, associate and Joint Venture companies which have been made on account of business expediency and not for the purpose of earning any exempt income.

2.4 That on the facts and in the circumstances of the case and without prejudice to Ground No. 1.0 to 1.3 , Ground 2.0, 2.1 and 2.3 taken here-in-above, the Ld. Pr. CIT was not justified and grossly erred in directing that disallowance u/s 14A r.w.r 8D made under normal provisions by Ld. A.O. in the order u/s 143(3) should also be made while computing Book profit u/s 115JB without appreciating the fact that said disallowance is erroneous as the same has been computed by including investment which have not generated exempt income during the previous year.



3.0 That on the facts and in the circumstances of the case and without prejudice to Ground No. 1.0 to 1.3 taken here-in-above, the Ld. Pr. CIT was not justified and grossly erred in holding that claim of education cess debited to Profit & Loss A/c is not an allowable business expense in computing total income under the provisions of the Act other than Sec. 115JB of the Act.

4.0 That on the facts and in the circumstances of the case and without prejudice to Ground No. 1.0 to 1.3 taken here-in-above, the Ld. Pr. CIT was not justified and grossly erred in denying the claim for deduction of provision for doubtful debts amounting to Rs. 4.16.76.2087-.

5.0 That on the facts and in the circumstances of the case and without prejudice to Ground No. 1.0 to 1.3 taken here-in-above, the Ld. Pr. CIT was not justified and grossly erred in denying the claim for exclusion of Excise Duty Incentive of Rs. 31,28,13,3077-, being capital in nature, in computing book profit u/s 115JB of the Act.

6.0 That on the facts and in the circumstances of the case and without prejudice to Ground No. 1.0 to 1.3 taken here-in-above, the Ld. Pr. CIT was not justified and grossly erred in denying the claim for exclusion of amount of retention money of Rs.30,56,23,114/- not accrued during the year, in computing book profit u/s 115JB of the Act.

7.0 That the appellant craves leave to add, amend, modify, rescind, supplement, or alter any of the grounds stated here-in-above, either before or at the time of hearing of this appeal.

2.2 The original assessment for year under consideration was framed by Ld. AO on 30/03/2016 wherein the loss was determined at Rs.44.76 Crores as against revised returned loss of Rs.48.52 Crores e-filed by the assessee on 31/03/2015. The book losses u/s 115JB were filed at Rs.12.53 Crores. It is apparent from the assessment that the returned loss was reduced in view of adjustment for corporate guarantee, depreciation disallowance and disallowance u/s 14A. It is also apparent that Ld. AO has not computed Book Profits u/s 115JB in the quantum assessment order and no discussion, whatsoever, has been made in the order, in this regard.

2.3 Subsequently, Ld. Pr.CIT-1, Mumbai, after perusal of case records, noted that Ld. AO had made disallowance u/s 14A which should have



been added back u/s 115JB, however, the same was not added back while computing Book Profits u/s 115JB. It was further noted that the assessee claimed deduction of education-cess u/s 40 (a)(ii) which was nothing but additional surcharge and therefore, the same was erroneously allowed. Thirdly, the assessee claimed deduction of provision for doubtful debt amounting to Rs.416.76 Lacs in the revised return of income which was erroneously allowed. Fourthly, the assessee, in revised return of income, claimed excise duty exemption of Rs.31.28 Crores as capital receipts u/s 115JB which was erroneously allowed. Similarly, assessee excluded amount of Rs.30.56 Crores representing retention money u/s 115JB which has erroneously been allowed by Ld. AO.

2.4 Accordingly, the assessee was show-caused that the assessment order was erroneous as well as prejudicial to the interest of the revenue due to aforesaid errors and omissions on the part of Ld. AO.

2.5 In response, the assessee submitted that the assessee computed disallowance u/s 14A read with Rule 8D for Rs.56.03 Lacs while computing the income under normal provisions. Since, the disallowance u/r 8D was computed as per artificial formulae, the same could not be imported as an adjustment in terms of Clause (f) to Explanation-1 to Sec. 115JB. Regarding education cess, it was submitted that cess is levied on the amount of tax and the same do not fall within the ambit of Sec. 40(a)(ii). Reliance was placed on certain judicial pronouncements to fortify the same. Regarding provision for doubtful debts, it was submitted that the assessee fulfilled the requirements of Sec. 36(1)(vii) and therefore, the same was an allowable deduction. Regarding excise duty



exemption, it was contended that the subsidy was given with an objective to achieve industrialization in backward area and the same would be capital receipt in nature. Regarding retention money on contract receipts, it was submitted that the assessee excluded the same since the assessee had no right to receive the said money by virtue of contractual terms. In the above background, it was submitted that the assessment order was neither erroneous nor prejudicial to the interest of the revenue and the same would not require interference u/s 263. However, not convinced, Ld. Pr.CIT set aside the assessment order and directed Ld. AO to redo the assessment afresh after affording opportunity of hearing to the assessee.

3. Aggrieved, by the directions, the assessee is under appeal before us. We have carefully heard the rival submissions, perused relevant material on record including submissions made by the assessee during assessment proceedings as well as revisional proceedings. The prime argument of Ld. AR revolves around the fact that various queries were raised by Ld.AO during assessment proceedings on these issues, which were duly replied to by the assessee along with documentary evidences. The Ld. AO framed assessment after due verification of the documents. The computation made by the assessee u/s 115JB was in conformity with judicial pronouncements and it could not be said that AO did not apply his mind to the same or failed to make any inquiry on the issues. The Ld. AR also contested the merits of the issue by placing reliance on certain judicial pronouncements. Per Contra, Ld. CIT-DR submitted that Ld. AO failed to apply his mind to compute assessee's income u/s 115JB



and the failure to do the same would make the order amenable to revisional jurisdiction u/s 263.

4. Upon perusal of quantum assessment order, it is noted that consequent to change in jurisdiction, a fresh notice u/s 142(1) was issued to the assessee during assessment proceedings on 27/01/2016 and the assessment was framed on 30/03/2016 i.e. within a short span of approx. 2 months. The assessee has placed on record its submissions dated 09/02/2016 to submit that requisite details as called for by Ld. AO were duly furnished by the assessee and the same were considered while framing the assessment and therefore, jurisdiction u/s 263 was bad in law. However, upon perusal of submission dated 09/02/2016, we find that beside furnishing party-wise list of provision for doubtful debts along with ageing thereof, no other information / documents were supplied by the assessee with respect to any of the issues as pointed out by Ld. Pr.CIT. Upon perusal of impugned order, we find that Ld. Pr.CIT has invoked jurisdiction u/s 263 since, in his opinion, Ld. AO, *inter-alia*, failed to consider disallowance u/s 14A, Excise Duty Exemption, Retention money for the purpose of Section 115JB. Upon perusal of quantum assessment order, it is noted that Ld. AO has even failed to compute assessee's Book Profits u/s 115JB and no discussion, whatsoever, on the stated issues, emanates either from quantum assessment order or from the submissions made by the assessee during assessment proceedings. The failure to compute assessee's income u/s 115JB, in our considered opinion, would certainly make the order liable for exercise of revisional jurisdiction u/s 263. There was a certain omission on the part of Ld. AO in not considering the computation of Book Profits



u/s 115JB and therefore, the jurisdiction u/s 263 was rightly invoked by Ld. Pr.CIT, which was the only remedy available with the revenue. Therefore, we are not inclined to interfere in the revisional jurisdiction us 263 as invoked by Ld. Pr.CIT on the stated issues. The twin conditions as envisaged by Sec. 263 were duly fulfilled, in the present case. For the same, we draw strength from legal principles laid down in judicial pronouncements as enumerated by us in the opening paragraphs as well as the provisions of Explanation-2 to Section 263.

5. At the same time, it is noted that the quantum order has been set aside from framing of assessment afresh which, in our opinion, would not be correct approach in the present case since it would afford opportunity of review of issues which were already considered and adjudicated by Ld.AO during original assessment proceedings. Review of the order, unless permitted by law, is impermissible. Therefore, we modify the directions of Ld. Pr.CIT by directing Ld. AO to re-consider / re-adjudicate only those issues which triggered revisional jurisdiction u/s 263. These issues have already been framed by Ld. Pr.CIT in impugned order u/s 263.

6. The Ld. AR, during the course of hearing, advanced arguments on merits of the issues. However, we refrain from dealing with the same at this stage since the subject matter of appeal before us is nothing more than to consider the validity of revisional jurisdiction u/s 263.

7. Accordingly, Ground No. 1.3 stand partly allowed whereas all the other grounds stand dismissed.



8. The appeal stands partly allowed in terms of our above order.

Order pronounced in the open court on 24th October, 2019.

Sd/-

(Mahavir Singh)

न्यायिक सदस्य / **Judicial Member**

Sd/-

(Manoj Kumar Aggarwal)

लेखा सदस्य / **Accountant Member**

मुंबई Mumbai; दिनांक Dated : 24/10/2019
Sr.PS, Jaisy Varghese

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT– concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

आदेशानुसार/ BY ORDER,

**उप/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई / ITAT, Mumbai.**