

IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'F' BENCH,
NEW DELHI

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND
MS. SUCHITRA KAMBLE, JUDICIAL MEMBER

ITA No. 3846/DEL/2019
[A.Y 2014-15]

M/s Radiant Hues CRM Solutions Pvt. Ltd
D-72, Westend Heights
DLF Phase - V, Gurgaon

Vs. The Pr. C.I.T
Gurgaon

PAN:AACCE 6760 A

(Applicant)

(Respondent)

Assessee By : Shri Rohit Jain, Adv
Shri Deepesh Jain, CA
Shri Arpit Goyal, CA

Department By : Shri Sanjay Shivam, CIT- DR

Date of Hearing : 30.10.2019
Date of Pronouncement : 31.10.2019

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER,

With this appeal, the assessee has challenged the validity of the order dated 31.01.2019 framed u/s 263 of the Income-tax Act, 1961

[hereinafter referred to as 'The Act'] by the Pr. CIT, Gurgaon pertaining to A.Y 2014-15.

2. Facts on record show that in this case, assessment was completed u/s 143(3) of the Act vide order dated 25.11.2016. On a perusal of the assessment record, the ld. PCIT was of the strong belief that the assessment order passed by the Assessing Officer is erroneous and prejudicial to the interest of the Revenue for the reason that the assessee-company has issued total 21,984 shares @ Rs. 678.52 per share to various parties against the face value of Rs. 10/- each and received share premium to the tune of Rs. 1,49,16,583/-. The ld PCIT was of the opinion that the Assessing Officer was required to examine and verify the justification of share premium with regard to FMV and the creditworthiness of the subscriber to whom the said shares have been allotted at a huge premium.

3. According to the ld. PCIT, since the Assessing Officer had failed to apply his mind and to examine the same, this non-application of mind of the Assessing Officer in framing the assessment order leads to the completion of order as erroneous and prejudicial to the Revenue. Accordingly, the ld. PCIT issued notice u/s 263 of the Act. Proceedings

were attended and queries raised by the ld. PCIT were duly replied by the assessee.

4. After considering the submissions of the assessee, the ld. PCIT concluded that the Assessing Officer has failed to apply his mind and has not examined the receipt of share premium thereby making the assessment order erroneous and prejudicial to the interest of the Revenue and accordingly, the ld. PCIT set aside the assessment order and directed the Assessing Officer to pass fresh assessment order after making proper enquiries/verifications.

5. Before us, the ld. counsel for the assessee vehemently submitted that the ld. PCIT has wrongly assumed jurisdiction u/s 263 of the Act. It is the say of the counsel that during the course of assessment proceedings, the Assessing Officer has raised specific queries to which the assessee had replied, specifically supported with documentary evidences and therefore, it cannot be said that the Assessing Officer has not made any enquiry on the impugned issue. The ld. counsel for the assessee further stated that the ld. PCIT has grossly erred in treating the entire increase in share capital for the year under consideration.

6. The ld. counsel for the assessee pointed out that the assessee has issued Compulsorily Convertible Debenture [CCD] aggregating to Rs. 1.35 crores in the immediately preceding Assessment Year 2013-14. The ld. counsel for the assessee further stated that during the year under consideration, CCD alongwith accrued interest thereon were converted into equity shares of the appellant at Rs. 688.52 per share which included face value of Rs. 10/- and share premium of Rs. 678.52 per share.

7. The ld. counsel for the assessee further stated that only share capital and premium aggregating to Rs. 25 lakhs belonged to the year under consideration and balance is brought forward CCD converted into equity shares. The ld. counsel for the assessee concluded by stating that since the ld. PCIT has himself proceeded on erroneous facts, which itself shows non-application of mind by the ld. PCIT, therefore, the order framed u/s 263 of the Act deserves to be quashed.

8. Per contra, the ld. DR strongly supported the findings of the ld. PCIT. It is the say of the ld. DR that Explanation 2 has been inserted in section 263 of the Act by the Finance Act, 2015 w.e.f 01.06.2015 and the said Explanation squarely applies on the facts of the case in hand.

In support of the order of the ld. PCIT, the ld. DR relied upon various judicial decisions.

9. We have given thoughtful consideration to the orders of the authorities below. Exhibit 2 of the paper book is balance sheet of the assessee and Exhibit 4 is details of the share capital. It can be seen from the details of the balance sheet that as on 31.03.2013, CCDs were at Rs. 1.35 crores which has become NIL as on 31.03.2014 [year under consideration]. Debentures have been converted into equity shares thereby increasing the share capital from Rs. 35,74,110/- to Rs. 38,27,850/-. Simultaneously, security premium increased from Rs. 43,25,890/- to Rs. 2,18,07,423/-. A perusal of the balance sheet details clearly proves that substantial part of the share capital was subsumed in CCD coming from the previous Assessment Year.

10. Exhibit 14 is notice u/s 142(1) of the Act dated 08.06.2016 wherein, vide Point No. 1, the Assessing Officer asked the assessee to justify large share premium received during the year, give complete names and addresses of applicants on shares alongwith PAN, file a copy of ledger account alongwith documents filed with ROC.

11. Reply of the assessee is placed at page 15 which shows the details of documents filed with reply. Vide notice dated 01.08.2016, the Assessing Officer further asked the assessee to furnish proof that the debenture money has been received in F.Y.2012-13 and valuation report of shares to justify premium amount.

12. Reply to this query is placed at page 139 of the paper book wherein the assessee has furnished complete details of debentures justifying that they were taken in F.Y. 2012-13 supported by copy of valuation report of shares justifying the premium of conversion on which basis CCD being converted into shares in Assessment Year 2014-15, the year under consideration.

13. This entire exercise of the Assessing Officer can be seen reflected in the body of the assessment order itself. A conspectus reading of the assessment order vis a vis the issues raised by the Id. PCIT would show that the Id. PCIT has assumed jurisdiction on the ground that no proper enquiries were conducted by the Assessing Officer during the course of assessment proceedings. Whereas, the facts on record and as discussed hereinabove clearly reveal that thorough and investigative enquiries were conducted by the Assessing

Officer, not only from the assessee, but also from all the concerned persons.

14. We find that it is a settled position of law that powers u/s 263 of the Act can be exercised by the Commissioner on satisfaction of twin conditions, i.e., the assessment order should be erroneous and prejudicial to the interest of the Revenue. By 'erroneous' it is meant contrary to law. Thus, this power cannot be exercised unless the Commissioner is able to establish that the order of the Assessing Officer is erroneous and prejudicial to the interest of the Revenue. Thus, where there are two possible views and the Assessing Officer has taken one of the possible views, no action to exercise powers of revision can arise, nor can revisional power be exercised for directing a fuller enquiry to find out if the view taken is erroneous. This power of revision can be exercised only where no enquiry, as required under the law, is done. It is not open to enquire in case of inadequate inquiry. Our view is fortified by the decision of Hon'ble High Court of Bombay in the case of CIT vs. Nirav Modi, [2016] 71 taxmann.com 272 (Bombay). This view is further supported by the decision of the Hon'ble Gujarat High Court in the case of Shri Prakash Bhagchand Khatri in Tax Appeal

No. 177 with Tax Appeal No.178 of 2016, wherein the Hon'ble Gujarat High Court was seized with the following *substantial question of law*:-

"Whether the Tribunal is right in law and on facts in upholding the order passed by the CIT under [section 263](#) of the Act on merits and still storing the issue of allowability of deduction under [section 54](#) of the Act to the file of Assessing Officer even though the working of allowability of deduction under [section 54F](#) is available in the order under [section 263](#) which is not disputed by the assessee before ITAT."

15. And the Hon'ble High Court, after considering the facts, held. as under:-

"6. It can thus be seen that though final order of assessment was silent on this aspect, the Assessing Officer had carried out inquiries about the nature of sale of land and about the validity of the assessee's claim of deduction under [section 54F](#) of the Act. Learned counsel for the Revenue however submitted that these inquiries were confined to the claim of deduction under [section 54F](#) of the Act in the context of fulfilling conditions contained therein and may possibly have no relevance to the question whether the sale of land gave rise to a long term capital gain. Looking to the tenor of queries by the Assessing Office and details . A.Y. 2009-10 supplied by the assessee, we are unable to accept such a condition.

In that view of the matter, the observation of the Tribunal that the Assessing Officer having made inquiries and when two views are possible, revisional powers could not be exercised, called for no interference. Since with respect to computation and assertions of other aspects of deduction under [section 54F of the](#) Act, the Tribunal has remanded the proceedings, nothing stated in this order would affect either side in considerations of such claim.

7. No question of law arises. Tax Appeals are dismissed."

16. The Hon'ble Supreme Court in *Malabar Industrial Co. Ltd.*, 243 ITR 83, has laid down the following ratio:

"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 ".

17. The co-ordinate bench in the case of Technip UK Ltd, ITA No. 1116/DEL/2014 vide order dated 17.12.2018 has held. as under:

"62. We find the Hon'ble Delhi High Court in the case of CIT Vs. Anil Kumar reported in 335 ITR 83 has held. that where it was discernible from record that the A.O has applied his mind to the issue in question, the ld.. CIT cannot invoke section 263 of the Act merely because he has different opinion. Relevant observation of the High Court reads as under:

63. We find the Hon'ble Delhi High Court in the case of Vikas Polymer reported in 341 ITR 537 has held. as under:

"We are thus of the opinion that the provisions of s. 263 of the Act, when read as a composite whole make it incumbent upon the CIT before exercising revisional powers to : (i) call for and examine the record, and (ii) give the assessee an opportunity of being heard and thereafter to make or cause to be made such enquiry as he deems necessary. It is only on fulfilment of these twin conditions that the CIT may pass an order exercising his power of revision. Minutely examined, the provisions of the section envisage that the CIT may call for the records and if he prima facie considers that any order passed

therein by the AO is erroneous insofar as it is prejudicial to the interest of the Revenue, he may after giving the assessee an opportunity of being heard and after making or causing to be made such enquiry as he deems necessary, pass such order thereon as the circumstances of the case justify. The twin requirements of the section are manifestly for a purpose. Merely because the CIT considers on examination of the record that the order has been erroneously passed so as to prejudice the interest of the Revenue will not suffice. The assessee must be called, his explanation sought for and examined by the CIT and thereafter if the CIT still feels that the order is erroneous and prejudicial to the interest of the Revenue, the CIT may pass revisional orders. If, on the other hand, the CIT is satisfied, after hearing the assessee, that the orders are not erroneous and prejudicial to the interest of the Revenue, he may choose not to exercise his power of revision. This is for the reason that if a query is raised during the course of scrutiny by the AO, which was answered to the satisfaction of the AO, but neither the query nor the answer were reflected in the assessment order, this would not by itself lead to the conclusion that the order of the AO called for interference and revision. In the instant case, for example, the CIT has observed in the order passed by him that the assessee has not filed certain documents on the record at the time of assessment. Assuming it to be so, in our opinion, this does not justify the conclusion arrived at by the CIT that the AO had shirked his responsibility of examining and investigating the case. More so, in view of the fact that the assessee explained that the capital investment made by the partners, which had been called into question by the CIT was duly reflected in the respective assessments of the partners who were I.T. assesseees

and the unsecured loan taken from M/s Stutee Chit & Finance (P) Ltd. was duly reflected in the assessment order of the said chit fund which was also an assessee.”

64. Since in the instant case the A.O after considering the various submissions made by the assessee from time to time and has taken a possible view, therefore, merely because the DIT does not agree with the opinion of the A.O, he cannot invoke the provisions of section 263 to substitute his own opinion. It has further been held. in several decisions that when the A.O has made enquiry to his satisfaction and it is not a case of no enquiry and the DIT/CIT wants that the case could. have been investigated/ probed in a particular manner, he cannot assume jurisdiction u/s 263 of the Act. In view of the above discussion, we hold. that the assumption of jurisdiction by the DIT u/s 263 of the Act is not in accordance with law. We, therefore, quash the same and grounds raised by the assessee are allowed.”

18. In yet another case, Jubilant Energy [P] Ltd ITA No. 3927/DEL/2016 order dated 04.07.2018, the co-ordinate bench under similar facts and circumstances, has held. as under:

“19. The Hon'ble Bombay High Court in the case of Gabriel India Ltd 203 ITR 108 has held. as under:

“The power of suo motu revision under subsection (1) is in the nature of supervisory jurisdiction and the same can be exercised only if the circumstances specified therein exist.

Two circumstances must exist to enable the Commissioner to exercise power of revision under this sub-section, viz., (i) the order is erroneous; (ii) by virtue of the order being erroneous prejudice has been caused to the interests of the Revenue. It has, therefore, to be considered firstly as to when an order can be said to be erroneous. We find that the expressions "erroneous", "erroneous assessment" and "erroneous judgment" have been defined in Black's Law Dictionary. According to the definition, "erroneous" means "involving error; deviating from the law". "Erroneous assessment" refers to an assessment that deviates from the law and is, therefore, invalid, and is a defect that is jurisdictional in its nature, and does not refer to the judgment of the Assessing Officer in fixing the amount of valuation of the property. Similarly, "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".

12. From the aforesaid definitions 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 visualise 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 visualised 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. It may be said in such a case that in the opinion of the Commissioner the order in question is prejudicial to the interests of the Revenue. But that by itself will not be enough to vest the Commissioner with the power of suo motu revision because the first requirement, viz., that the order is erroneous, is absent. Similarly, if an order is erroneous but not prejudicial to the interests of the Revenue, then also the power of suo motu

revision cannot be exercised. Any and every erroneous order cannot be the subject-matter of revision because the second requirement also must be fulfilled. 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. We, therefore, hold. that in order to exercise power under sub-section (1) of [section 263](#) of the Act there must be material before the Commissioner to consider that the order passed by the Income-tax Officer was erroneous in so far as it is prejudicial to the interests of the Revenue. We have already held. what is erroneous. It must be an order which is not in accordance with the law or which has been passed by the Income-tax Officer without making any enquiry in undue haste. We have also held. as to what is prejudicial to the interests of the Revenue. An order can be said to be prejudicial to the interests of the Revenue if it is not in accordance with the law in consequence whereof the lawful revenue due to the State has not been realised or cannot be realised. There must be material available on the record called for by the Commissioner to satisfy him prima facie that the aforesaid two requisites are present. If not, he has no authority to initiate proceedings for revision. Exercise of power of suo motu revision under such circumstances will amount to arbitrary exercise of power.

It is well-settled that when exercise of statutory power is dependent upon the existence of certain objective facts, the authority before exercising such power must have materials on record to satisfy it in that regard. If the action of the authority is challenged before the court it would be open to the courts to examine whether the relevant objective factors were available from the records called for and examined by such authority.

The Income-tax Officer in this case had made enquiries in regard to the nature of the expenditure incurred by the assessee. The assessee had given detailed explanation in that regard by a letter in writing. All these are part of the record of the case. Evidently, the claim was allowed by the Income-tax Officer on being satisfied with the explanation of the assessee. Such decision of the Income-tax Officer cannot be held to be "erroneous" simply because in his order he did not make an elaborate discussion in that regard. Moreover, in the instant case, the Commissioner himself, even after initiating proceedings for revision and hearing the assessee, could not say that the allowance of the claim of the assessee was erroneous and that the expenditure was not revenue expenditure but an expenditure of capital nature. He simply asked the Income-tax Officer to re-examine the matter. That, in our opinion, is not permissible. Hence the provisions of section 263 of the Act were not applicable to the instant

case and, therefore, the commissioner was not justified in setting aside the assessment order."

19. The ld.. DR placed reliance on the decision in the case of Rajmandir Estates 386 ITR 162 wherein the Assessing Officer did not make any enquiry in respect of huge premium collected by the assessee with a small amount of authorised share capital and, therefore, it was held. that the commissioner was justified in treating the assessment order as erroneous and prejudicial to the interest of the revenue.

20. Another decision relied upon by the ld.. DR which is in the case of Manjunathesware Packing Products and Camphor Works 231 ITR 53, would., in fact, do good to the assessee because in that case, the Hon'ble Supreme Court held. that the word "record" used in Sec. 263 (1) of the Act would. mean the record as it stands at the time of examination by the Commissioner, but not as it stands at the time the order was passed by the Assessing Officer.

21. Records which were examined by the ld. PCIT, had it been examined by due application of mind, the ld. PCIT would. have known

that CCD pertaining to Assessment Year 2013-14 i.e., the immediately preceding Assessment Year and only on conversion, the entries have been made in the share capital and share premium account.

22. The other decisions relied upon by the ld.. DR are misplaced and need no separate adjudication.

23. Considering the facts of the case in hand, in totality, in the light of judicial decisions discussed hereinabove, supported by a vortex of evidences, examined and analysed by the Assessing Officer during the course of assessment proceedings, further supported by thorough investigations/enquiries made by the Assessing Officer during the assessment proceedings, we are of the considered view that there remains nothing for the ld. PCIT to assume jurisdiction u/s 263 of the Act to say that the assessment order is not only erroneous but prejudicial to the interest of the revenue. We are of the considered view that the ld. PCIT has wrongly assumed jurisdiction u/s 263 of the Act, hence his combined order for all the A.Ys deserves to be set aside. We, accordingly, set aside the order of the ld. PCIT and restore that of the Assessing Officer. We order accordingly.

24. In the result, the appeal of the assessee in ITA No. 3846/DEL/2019 is allowed.

The order is pronounced in the open court on 31.10.2019.

Sd/-

[SUCHITRA KAMBLE]
JUDICIAL MEMBER

Sd/-

[N.K. BILLAIYA]
ACCOUNTANT MEMBER

Dated: 31st October, 2019

VL/

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,
ITAT, New Delhi

| | |
|---|--|
| Date of dictation | |
| Date on which the typed draft is placed before the dictating Member | |
| Date on which the typed draft is placed before the Other Member | |
| Date on which the approved draft comes to the Sr.PS/PS | |
| Date on which the fair order is placed before the Dictating Member for pronouncement | |
| Date on which the fair order comes back to the Sr.PS/PS | |
| Date on which the final order is uploaded on the website of ITAT | |
| Date on which the file goes to the Bench Clerk | |
| Date on which the file goes to the Head Clerk | |
| The date on which the file goes to the Assistant Registrar for signature on the order | |
| Date of dispatch of the Order | |