IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "C" New Delhi

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

आ.अ.सं/I.T.A Nos.1102 & 1103/Del/2018
निर्धारणवर्ष/Assessment Years:2013-14 & 2014-15

JITF Water Infra (Naya Raipur) Ltd., **28, Shivaji Marg, West Delhi,** **New Delhi.**	बनाम **Vs.**	**ITO,** **Ward 13(3),** **New Delhi.**
अपीलार्थी **Appellant**		प्रत्यर्थी/**Respondent**
PAN No. AACCJ2374D		

निर्धारितीकीओरसे **/Assessee by**	**Sh. Rohit Jain, Advocate** **Sh. Divyam Mittal, CA**
राजस्वकीओरसे **/Revenue by**	**Ms. Shefali Swaroop, Sr. DR**

सुनवाईकीतारीख/ Date of hearing:	27.11.2019
उद्घोषणाकीतारीख/Pronouncement on	28.11.2019

आदेश /O R D E R

PER N.K. BILLAIYA, A.M.

1. These are two separate appeals by the assessee preferred against two separate orders of the PCIT-5, Delhi dated 18.12.2017 pertaining to AYs. 2013-14 & 2014-15 framed u/s 263 of the Income Tax Act, 1961.

2. Since, the underline facts in the issues in both these appeals are identical, therefore, both these appeals were heard together and are disposed of by this common order for the sake of convenience.

3. We heard the respective Representatives on the facts of AY 2013-14. Case records carefully perused and with the assistance of the Ld. Counsel, we have considered the relevant documentary evidences brought on record in the light of Rule 18(6) of the ITAT Rules.

4. Appellant is a company engaged in the business of providing water for human consumption or industrial purposes for residential areas, industry and municipality and for that purpose laid down/set up/water treatment plants and distribution system in the areas where there is a need for adequate water supply and dispose of the waste water.

5. Water concession agreement dated 05.11.2009 entered with New Raipur Development Authority (NRDA), the appellant was granted concession by NRDA to design, construct and develop facilities for extraction of raw water, production of treated water and its supply and storage in the water storage reservoir in the service area by installing plant and equipment and to do civil work. The appellant was awarded the contract on Build, Operate and Transfer (BOT) basis for development and operation of the water supply system. The agreement was entered into for a period of 8 years commencing from 05.11.2009 and the date of expiry of the concession period was 04.11.2017. In the agreement it has been made abundantly clear that ownership of the site and the project facilities shall throughout the concession period remain with NRDA and the appellant was granted right to use the same.

6. It is further provided that NRDA shall pay to the appellant total amount of Rs. 115.60 crores as financial assistance for the construction of project facilities during the period commencing from appointed date to commercial operation date. This financial assistance was linked to and payable in achievement of specific milestones as prescribed in the agreement. In consideration of the appellant accepting the concession, the appellant was entitled to receive concession payment of Rs. 84 lakhs per quarter from Commercial Operations Date. As increased on account of collection efficiency as prescribed in the agreement. The details of financial assistance received along with expenditure incurred from AY 2010-11 to 2014-15 is as under:

Particulars	**Assessment Year**					
	2010-11	**2011-12**	**2012-13**	**2013-14**	**2014-15**	**Total**
Financial Assistance received [A]	-	18,40,00,000	52,10,00,000	18,50,00,000	6,48,80,000	95,48,80,000
Expenditure incurred [B]	14,64,893	28,36,30,167	62,63,75,732	20,87,13,117	12,75,21,326	124,77,05,237
Excess of exp over Financial Assistance [C=A-B]	**(14,64,893)**	**(9,96,30,167)**	**(10,53,75,732)**	**(2,37,13,117)**	**(6,26,41,326)**	**(29,28,25,237)**

7. From the aforementioned chart it can be seen that in AY 2013-14 the appellant received a sum of Rs. 18.50 crores as financial assistance from NRDA and in AY 2014-15 the appellant received Rs. 6.48 crores.

8. The treatment of this financial assistance is the cause of quarrel between the appellant and the Revenue. The AO has accepted the contention of the assessee that this financial assistance being a capital receipt has rightly been treated as such by the appellant in its books of account as part of capital work in progress. Assuming jurisdiction u/s 263 of the Act the PCIT is of the opinion that the AO has not made any thorough investigation/enquiry and has simply accepted the contention of the assessee. In the opinion of the PCIT this financial assistance is of Revenue in nature and should have been taxed as income of the assessee and in not doing so the assessment order has become erroneous and pre-judicial to the interest of the Revenue.

9. Before us, the Counsel for the assessee vehemently stated that a thorough enquiry was made by the AO. It is the say of the Counsel that specific queries were raised during the course of the assessment proceedings itself to which specific replies were given by the assessee. Therefore, it cannot be said that no enquiry was made by the AO. The Counsel further contended that the root cause is whether the financial assistance received by the appellant is capital receipt or Revenue receipt. The Counsel strongly contended that it is the nature of the grant which is the determinative factor and what has to be seen is the purpose of which the financial assistance was received. Since, the financial assistance was received for the set up of facilities for extraction of raw water, production of treated water and supply and storage in the

water storage reservoir by installing plant and equipment the financial assistance is a capital receipt and has been rightly accepted by the AO. It is the say of the Counsel that the view taken by the AO is a plausible view and, therefore, proceedings u/s 263 of the Act are unwarranted and deserves to be set aside. The Counsel further stated that it is incumbent upon the PCIT before setting aside the assessment he is required to record the *prima facie* finding on the merits of the matter after conducting necessary enquiries and the PCIT is not empowered to blanketly set aside the assessment order. Strong reliance was placed on several judicial decisions which are in the form of case law paper book.

10. Per contra, the DR strongly supported the findings of the PCIT. It is the say of the DR that the AO did not make necessary enquiries and has accepted the returned income of the assessee and the entire assessment order is *devoid* of enquiry.

11. We have given a thoughtful consideration to the rival contentions. The nature of business activity of the appellant has already been mentioned elsewhere along with the concession agreement dated 05.11.2009 entered into between NRDA and the appellant.

12. As mentioned elsewhere the bone of contention is the treatment of financial assistance received by the assessee from NRDA. In our considered opinion, taxation of grant/subsidy by whatever name called is determined by the purpose for which the grant/subsidy is granted. This

view is fortified by the decision of the Hon'ble Supreme Court in the case of V.S.S.V. Meenakshi Achi 60 ITR 253 in which the Hon'ble Supreme Court held that the character of the subsidy in the hands of the recipient is to be determined having regard to the purpose for which the subsidy has been given. This principle has been reiterated by the Hon'ble Supreme Court in the case of Sahni Steel & Press Works Ltd. 228 ITR 253, wherein the Hon'ble Supreme Court held that the character of a subsidy in the hands of the recipient whether Revenue or Capital is to be determined having regard to the purpose for which the subsidy is given. It was further held that if the purpose of the subsidy is to help the assessee to set up its business or complete a project the subsidy is to be treated as having been received for capital purposes, whereas if the subsidy is given to the assessee for assisting him in carrying out the business operations and is given only after and conditionally been commencement of production such subsidy is to be treated as assistance for the purpose of the trade and would constitute revenue receipt. This principle was once again reiterated by the Hon'ble Supreme Court in the case of Ponni Sugars & Chemicals 306 ITR 392.

13. Considering the afore-stated ratio laid down by the Hon'ble Supreme Court and considering the nature of financial assistance given by NRDA to the appellant, we are of the considered view that the financial assistance is capital in nature and the amount received by the appellant is capital receipt.

14. Having said all that let us now see what enquiries were made by the AO during the course of the assessment proceedings. The first query letter dated 21.04.2015 contained 47 points and the said query letter is placed at pages 239 to 243 of the PB. A detailed reply was filed vide reply dated 01.07.2015 and the same is placed at pages 367 to 371 of the PB. The second query letter is dated 21.09.2015 which is placed at page 364 of the PB and the reply has placed at page 361 of the PB dated 08.10.2015 in which the assessee specifically explained the treatment of receipts from NRDA and pointed out that the nature of receipts has already been explained in not on business activities. By another reply dated 30.10.2015 which is placed at page 356 of the PB the assessee explained that the financial assistance received from NRDA is in the nature of capital receipt and cannot be considered as Revenue receipt. It was specifically explained that financial assistance if received for creation of an asset is not taxable being capital receipt. It was pointed out that any receipt which is intrinsically connected with construction of assessee's plant would be capital receipt. A further reply was filed on 19.02.2016 giving the details of capital work in progress and treatment of amounts received from NRDA this reply is placed at pages 299 to 302 of the PB. Considering these plethora of evidences it cannot be said that no enquiry was made by the AO during the course of the assessment

proceedings. In fact while framing the assessment order u/s 143(3) of the Act AO has concluded as under:

> *"3. The company is stated to be concessionaire for development of water supply system in Naya Raipur City. During the year under consideration the work of the assessee is under first stage of project i.e. development of water treatment system. Total expenses incurred on this project, reduced by the entire grant received during the year are shifted into capital work in progress. Therefore, no profit and loss account is made by the assessee during the year under reference. The necessary details in this regard as called for were filed, examined and placed on record. Books of account were produced and examined on test check basis."*

15. With the understanding of the facts as considered at the assessment stage let us now consider some judicial decisions on this point which read as under:

> *"31. 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 Incometax 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 60 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 ".

32. 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. assessees 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."

33. 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 Incometax 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."

16. 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 analyzed by the AO during the course of the assessment proceedings, we are of the considered view that there remains nothing for the PCIT to assume jurisdiction u/s 263 of the Act to say that assessment order is not only erroneous but prejudicial to the interest of the Revenue. We are of the considered view that the PCIT has wrongly assumed the jurisdiction u/s 263 of the Act. Hence, his order for both the assessment years under consideration deserves to be set aside. We, accordingly, set aside the order of the PCIT and restore that of the AO.

17. In the result, both the appeals filed by the assessee are allowed.

The order pronounced in the open court on 28.11.2019

Sd/-	Sd/-
(SUCHITRA KAMBLE)	**(N.K. BILLAIYA)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 28th November, 2019
**Kavita Arora, Sr. PS*

Copy of order sent to- Assessee/AO/Pr. CIT/ CIT (A)/ ITAT (DR)/Guard file of ITAT.

By order

Assistant Registrar, ITAT: Delhi Benches-Delhi